Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor,
State of Alabama, Petitioners,

v.

POARCH CREEK INDIANS and POARCH BAND OF
CREEK INDIANS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do Article III, § 2 and the Eleventh Amendment preclude substantive judicial interpretation of the Indian Gaming Regulatory Act after the case has been dismissed for lack of subject matter jurisdiction?

2. Does the exercise by a state of its Eleventh Amendment immunity, standing alone, constitute a failure to negotiate in good faith as required by the Indian Gaming Regulatory Act?

3. Was the Eleventh Circuit correct that an Indian tribe may bypass statutory requirements, including a judicial finding of lack of good faith by a state, and go directly to the Secretary of the Interior for a gaming compact, or was the Eighth Circuit correct in adhering to the language of the Indian Gaming Regulatory Act?

4. Does the creative bypass designed by the Eleventh Circuit violate the Tenth Amendment?

PARTIES

The caption contains the names of all parties to the proceeding in the court below in Poarch Band.

Parties in the case consolidated on appeal with this case in the Eleventh Circuit were:

Seminole Tribe of Florida,
Appellant-Plaintiff

State of Florida,
Lawton Chiles, Governor of Florida,
Appellees-Defendants

Amici Curiae appearing in the Eleventh Circuit were:

The National Indian Gaming Association

The Tunica-Biloxi Tribe

The States of:

California
Connecticut
Kansas
Mississippi
Montana
Nebraska
Nevada
Oklahoma
South Dakota
Washington
Wyoming

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	vii
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS AND AND STATUTES	2
STATEMENT UNDER RULE 29.4(b).....	3
STATEMENT OF THE CASE.....	4
NATURE OF THE CONTROVERSY.....	4
THE DISTRICT COURT PROCEEDINGS.....	6
THE CIRCUIT COURT PROCEEDINGS.....	8
REASONS FOR GRANTING THE WRIT.....	9
I. INTERPRETATION OF THE INDIAN GAMING REGULATORY ACT PRESENTS QUESTIONS OF GREAT IMPORTANCE.....	9

TABLE OF CONTENTS

		PAGE
II.	SECTION V. OF THE ELEVENTH CIRCUIT DECISION NOT ONLY CONTRAVENES THE CONSTITUTION OF THE UNITED STATES, ARTICLE III, § 2 AND THE ELEVENTH AMENDMENT, BUT IS IN CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.....	13
III.	THE ELEVENTH CIRCUIT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, ~~DECIDED BY~~ THIS HONORABLE COURT.....	17
IV.	THE DECISION OF THE ELEVENTH CIRCUIT IS ERRONEOUS.....	21
V.	THE CONFLICT IN THE CIRCUITS SHOULD BE RESOLVED BY THIS HONORABLE COURT.....	26
VI.	BOTH THE INDIAN GAMING REGULATORY ACT AND THE CREATIVE BYPASS DESIGNED BY THE ELEVENTH CIRCUIT VIOLATE THE TENTH AMENDMENT.....	27
CONCLUSION.....		30

TABLE OF CONTENTS

APPENDICES

	PAGE
APPENDIX A.....	A1
APPENDIX B.....	B1
APPENDIX C.....	C1
APPENDIX D.....	D1
APPENDIX E.....	E1
APPENDIX F.....	F1
APPENDIX G.....	G1
APPENDIX H.....	H1

TABLE OF AUTHORITIES

PAGE(S)

Cases

Alabama v. Pugh,
438 U.S. 781, 57 L.Ed.2d 1114,
98 S.Ct. 3057 (1978)..... 18

Apache Tribe of the Mescalero
Reservation v. New Mexico,
CIV 92-076-JC, Slip Op.,
(D.C.N.M. Dec. 22, 1992).....14, 22

Cabazon Band of Mission Indians
v. National Indian Gaming Commission,
827 F.Supp 26 (D.DC. 1993)..... 19

Cheyenne River Sioux Tribe
v. South Dakota,
3 F.3rd 273 (8th Cir. 1993)..... 26

Landgraf v. USI Film Products,
___ U.S. ___, ___, 62 U.S.L.W.
4255 (April 26, 1994)..... 25

Lauro Lines S.R.L. v. Chasser,
490 U.S. 495 (1989)..... 15

Montana-Dakota Utilities Company v.
Northwestern Public Service Commission,
341 U.S. 246, 71 S.Ct. 692,
95 L.Ed. 912 (1951)..... 24

New York v. United States,
_____ U.S. _____, 120 L.Ed.2d
120, 112 S.Ct. 2405 (1992).....28, 29

TABLE OF AUTHORITIES

PAGE(S)

Cases

The News-Journal Corporation v. Foxman,
939 F.2d 1499 (11th Cir. 1991)..... 16

Northwest Airlines, Inc., v. Transportation Workers,
451 U.S. 77 (1981)..... 25

Poarch Creek Indians v. Alabama,
776 F.Supp. 550 (S.D.Ala. 1991) (Poarch I)..... 1

Poarch Creek Indians v. Alabama,
CIV 91-0757-H, Slip op. (S.D. Ala. Jan. 24, 1992) (Poarch II)..... 1

Poarch Creek Indians v. Alabama,
784 F.Supp. 1549 (S.D. Ala. 1992) (Poarch III)..... 1

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,
506 U.S. _____, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993).....14, 15

Seminole Tribe of Florida v. Florida and Poarch Creek Indians v. Alabama,
11 F.3rd 1016 (11th Cir. 1994), consolidated on appeal.....1, 8, 9, 11, 13, 18

TABLE OF AUTHORITIES

PAGE(S)

Cases

Seminole Tribe v. State of Florida, 1993 WL 475999 (S.D.Fla. 1993, Sept. 22, 1993)..... 20

Silver v. Baggiano, 804 F.2d 1211 (11th Cir. 1986)..... 19

United States v. Sisson, 399 U.S. 267, 26 L.Ed.2d 608, 90 S.Ct. 2117 (1970).....15, 16, 25

Constitutional Provisions

Constitution of the United States, Article III, § 2...i,.v, vi, 13, 18, 21

Constitution of the United States, Tenth Amendment....ii, v, 2, 18, 27, 28

Constitution of the United States, Eleventh Amendment .. ..i,.v, 2, 10,.13 14, 17, 18, 20, 21, 27, 29

Constitution of Alabama 1901, § 14..... 18

Statutes

18 U.S.C. 1166-68..... 3, 4

18 U.S.C. § 3731..... 15

25 U.S.C. § 1291..... 8

25 U.S.C. § 2701, et seq..... 3, 4

TABLE OF AUTHORITIES

PAGE(S)

Statutes

25 U.S.C. § 2703(8)..... 3, 4

25 U.S.C. § 2710(d)..... 3

25 U.S.C. § 2710(d)(1)..... 26

25 U.S.C. § 2710(d)(1)(B)..... 5

25 U.S.C. § 2710(d)(3)A..... 5

25 U.S.C. § 2710(d)(7)..... 23

25 U.S.C. § 2710(d)(7)(A)(i)..... 5, 7

Sections 2710(d)(7A)(ii) through 2710(d)(B)(vi)..... 24

Section 2710(d)(7)(B)(iii).....5, 9, 17

25 U.S.C. § 2701(d)(7)(B)(iv)..... 6

25 U.S.C. § 2710(d)(7)(B)(vii)..... 6

25 U.S.C. § 2710 (d)(7)(B)(vii)(I)... 24

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 2403(a)..... 3

Rules of Supreme Court

Rule 14..... 1

Rule 29.4(b).....iv, 3

TABLE OF AUTHORITIES

PAGE(S)

Other Authority

S.Rep. No. 100-446, 100th Congress, 1st Sess. 1-5, 1988 U.S. Code Cong. & Admin. News 3071-3076.....4, 25

OPINIONS BELOW

1. The opinion and judgment of the Eleventh Circuit is reported as Seminole Tribe of Florida v. State of Florida, et al. and Poarch Creek Indians v. State of Alabama, et al., 11 F.3rd 1016 (11th Cir. 1994), consolidated on appeal, and is submitted as Appendix A.

2. The opinions of the United States District Court for the Southern District of Alabama, dismissing this cause for lack of subject matter jurisdiction, are reported as follows: Poarch Creek Indians, et al. v. State of Alabama, et al., 776 F.Supp. 550 (S.D.Ala. 1991) and 784 F.Supp. 1549 (S.D.Ala. 1992), and are submitted as Appendices B and D. A third order is unpublished and is submitted as Appendix C.[1]

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[1]The appendices to this petition are separately bound pursuant to Rule 14.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed here was entered on January 18, 1994. Appendix A. On April 6, 1994, the Eleventh Circuit entered an order denying a timely application for rehearing. Appendix E. On April 28, 1994, the mandate was stayed. Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Constitution of the United States, Eleventh Amendment states:

> The judicial power of the United States shall not be construed to extend to any suit

> in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Constitution of the United States, Article III, § 2 is set forth in Appendix H.

25 U.S.C. §§ 2703(8) and 2710(d) of the Indian Gaming Regulatory Act, the most relevant here, are set forth in Appendix G.

STATEMENT UNDER RULE 29.4(b)

Since the constitutionality of IGRA, an Act of Congress affecting the public interest, may be drawn into question, 28 U.S.C. § 2403(a) may be applicable and this document will be served on the Solicitor General.

The Court of Appeals certified to the Attorney General that the constitutionality of an Act of Congress might be drawn into question and the Attorney General declined to appear below.

STATEMENT OF THE CASE

NATURE OF THE CONTROVERSY

The Indian Gaming Regulatory Act (IGRA) establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. 25 U.S.C. § 2701, et seq., and 18 U.S.C. 1166-68. It is the result of years of legislative debate and prior judicial decisions. S.Rep. No. 100-446, 100th Congress, 1st Sess. 1-5, 1988 U.S. Code Cong. & Admin. News 3071-3076.

Under IGRA Congress created three categories of gaming. The issues before this Court relate to Class III gaming, which includes all forms of gambling other than traditional Indian games and bingo. 25 U.S.C. § 2703(8).[2] Class III

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[2]All cited provisions of IGRA are contained in Appendix G.

gaming is lawful only in a state which permits such gambling for any purpose by any person, entity or organization. 25 U.S.C. § 2710(d)(1)(B).

A tribe desiring to conduct Class III gambling must request the State in which the Indian lands are located to negotiate a tribal-state compact governing Class III gambling. The State, according to IGRA, is directed to negotiate with the Indian tribe in good faith. 25 U.S.C. § 2710(d)(3)A.

If a State fails to negotiate or negotiate in good faith, IGRA provides that a tribe may initiate suit in federal district court. § 2710(d)(7)(A)(i).

If the court finds that the State has not acted in good faith, the court directs the State and the Tribe to conclude a compact. § 2710(d)(7)(B)(iii). If the compact is not completed within sixty days, the court appoints a mediator.

§ 2701(d)(7)(B)(iv). The compact proposal selected by the mediator is then sent to the Secretary of the Interior for implementation. § 2710(d)(7)(B)(vii).

Contrary to the Eleventh Circuit opinion, there is no provision in the statute for an Indian Tribe to apply directly to the Secretary of the Interior for a compact. Nor are there any provisions authorizing the Secretary to create a compact or to permit gambling on Indian lands without a state-tribal compact.

THE DISTRICT COURT PROCEEDINGS

Alabama offered to compact with the Poarch Band for pari-mutuel wagering on horse, dog and simul-cast races, the only forms of Class III gaming permitted under Alabama law. (R1-1-11; R1-1-14 through -16). The Tribe alleged that Alabama permits all types of gambling, other than a lottery, and that the Governor had

negotiated in bad faith by not agreeing to conclude a compact for casino gambling which is not allowed anywhere in Alabama. (R1-1-4 through -13) Negotiations having ended, the Poarch Band of Creek Indians filed suit against Alabama and its Governor on September 11, 1991, seeking a determination of the scope of gaming and a compact. Appendix B6-B9; (R1-1). All allegations of bad faith were denied by Alabama and the Governor. (R1-4 and R1-5) Jurisdiction was asserted primarily under § 2710(d)(7)(A)(i) of IGRA. Appendix A15.

The State answered and filed a motion to dismiss under the Eleventh Amendment. Appendix B8. On October 30, 1991, Alabama was dismissed. Appendix B70. After the Poarch Band's complaint was amended, Alabama was again dismissed. Appendix C7.

The Governor filed a motion to dismiss on Eleventh Amendment grounds and

the motion was granted on February 20, 1992. Appendix D1 and D17. All defendants having been dismissed, the Poarch Band's suit was terminated without reaching the merits of the matter, including whether negotiations were conducted in good faith. Appendices B, C and D.

THE CIRCUIT COURT PROCEEDINGS

On appeal, the Eleventh Circuit, having jurisdiction under 25 U.S.C. § 1291, consolidated Seminole Tribe of Florida v. State of Florida and Lawton Chiles, Governor (No. 92-4652) and Poarch Creek Indians, et al. v. State of Alabama and James E. Folsom, Governor (No. 92-6244), reported at 11 F.3rd 1016 (11th Cir. 1994). Appendix A, infra. In each of these cases the states asserted immunity from suit by Indian Tribes by virtue of the Eleventh Amendment. The Eleventh Circuit affirmed the dismissal of

the suit against Alabama in Poarch Band and reversed the district court in Seminole Tribe holding that both cases were to be dismissed for lack of subject matter jurisdiction. Appendix A66 and A69.

Section 2710(d)(7)(B)(iii) of IGRA mandates a threshold judicial finding that a state has failed to negotiate in good faith before relief can be granted. However, after ordering dismissal of the action, the Eleventh Circuit while "analyzing its holding" in Section V. of its decision, designed a bypass for the Tribes, permitting them to go directly to the Secretary of the Interior for gaming regulations. Seminole Tribe, 11 F.3rd at 1019, 1029. Appendix A66-A68.

REASONS FOR GRANTING THE WRIT

I.

INTERPRETATION OF THE INDIAN GAMING REGULATORY ACT PRESENTS QUESTIONS OF GREAT IMPORTANCE.

Rarely does a state who prevailed below seek review.[3] However, the importance of interpretation of the Indian Gaming Regulatory Act (IGRA), not only for the states, but also for Indian Tribes and the Secretary of the Interior, calls for review by this Honorable Court.

The Eleventh Circuit, interpreting IGRA, after having dismissed the action under the Eleventh Amendment, assumed jurisdiction and devised a remedy for the Poarch Band not found in IGRA. In order to do this, the Eleventh Circuit had to determine that raising a valid constitutional bar to a suit by a Tribe constitutes a lack of good faith by a

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[3]While it may appear on the face of the judgment that the State of Alabama and the Governor are prevailing parties, the result of the written opinion is that the Tribes may have won by losing.

state. Seminole Tribe, 11 F.3rd at 1029; Appendix A66-A68.

The Secretary, not a party below, has been empowered to prescribe gaming regulations for Indian gaming operations in Alabama even though there is no statutory basis for doing so.[4] The Eleventh Circuit did not limit such gaming to that authorized by state law, as IGRA does. Even with a finding of bad faith this procedure is improper.

While Alabama recognizes that economic development is very important to the Poarch Band of Creek Indians and other Tribes, Alabama and other States also have important interests in Indian gaming,

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[4]Although judicial interpretation by the Eleventh Circuit is arguably dicta, the Attorney General has been informed by the Department of the Interior that it has taken preliminary steps toward prescribing gaming regulations pursuant to the Eleventh Circuit opinion.

including but not limited to, a strong public policy in Alabama against Class III casino gambling as evidenced by constitutional prohibitions and statutes making it a crime. The State of Alabama, its citizens, the Attorney General, and the Governor have a legitimate interest in these matters of public policy, as well as a duty to defend these interests by all lawful means, including asserting the defense of sovereign immunity.

As matters stand today, the circuit and district courts and Tribes and states currently in the negotiating process are in a quandary. In the circuit and district courts conflicting decisions are proliferating rapidly and the need for guidance from this Court is acute. This case presents a timely and unique opportunity for this Court to provide guidance, where none has been given.

Because the questions presented are important and for the reasons set out hereafter, this Court should grant the petition, vacate Section V. of the Eleventh Circuit decision and permit the Congress to address the issue.

II.

SECTION V. OF THE ELEVENTH CIRCUIT DECISION NOT ONLY CONTRAVENES THE CONSTITUTION OF THE UNITED STATES, ARTICLE III, § 2 AND THE ELEVENTH AMENDMENT, BUT IS IN CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

Despite holding that the court below lacked jurisdiction over the merits, the Eleventh Circuit assumed jurisdiction, and in Section V. of the decision interpreted the Indian Gaming Regulatory Act (IGRA). Seminole Tribe, 11 F.3rd at 1029. Appendix A66-A68. Such judicial interpretation on the merits is inappropriate and inconsistent with the district court's obligation to dismiss without reaching the merits.

Where a court, trial or appellate, is required to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment, reaching the merits of a claim, even in what is arguably dicta, is itself a violation of the Eleventh Amendment. Apache Tribe of the Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op. at p. 2, (D.C.N.M. Dec. 22, 1992).

Judicial interpretation was also inappropriate here because once the matter was dismissed, there ceased to be a case or controversy. Constitution of the United States, Article III, § 2. In Section V. of its decision the Eleventh Circuit interpreted IGRA in violation of Article III and the Eleventh Amendment and in conflict with decisions of this Court.

In Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. _____, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), this Court found that the denial

of a claim by a state entity to Eleventh Amendment immunity could be appealed under the collateral order doctrine. In making this finding, this Court wrote:

> Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, cf. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring), **whose resolution generally will have no bearing on the merits of the underlying action.**

Puerto Rico Aqueduct, 506 U.S. at _____, 121 L.Ed.2d at 613 (emphasis added).

In United States v. Sisson, 399 U.S. 267 (1970), this Court dismissing for lack of jurisdiction under 18 U.S.C. § 3731 held:

> Consequently, this appeal must be dismissed for lack of jurisdiction **without our considering the merits of this case**. . . .

Sisson, 399 U.S. at 270 (emphasis added). Additionally, this Court said:

> We have today granted certiorari in Gillette v. United States . . . and Negre v. Larsen . . . in order to consider the "selective" conscientious objector issue that underlies the case now before us **but which we cannot reach because of our conclusion that we have no jurisdiction to entertain this direct appeal.**

Id., 399 U.S. at 613, n. 1 (emphasis added).

In The News-Journal Corporation v. Foxman, 939 F.2d 1499 (11th Cir. 1991) the Eleventh Circuit wrote the following:

> In denying the News-Journal's motion for reconsideration based on Younger, the district court also commented upon the substance, particularly the scope, of the restrictive order. In essence, the district court analyzed the restrictive order under the First Amendment, although it abstained under Younger. **Any substantive commentary and analysis is inconsistent with abstention for lack of jurisdiction based on Younger.**

Foxman, 939 F.2d at 1511 (emphasis added).

In contrast to and in direct conflict with these decisions, the Eleventh Circuit

in Section V. of the decision judicially interpreted IGRA providing substantive commentary and analysis directly affecting the rights and duties of the parties.

Both Younger abstention and Eleventh Amendment immunity are jurisdictional. Both depend on federalism as their source. If a federal court lacks jurisdiction to entertain a suit, it must be dismissed and the matter concluded.

III.

THE ELEVENTH CIRCUIT DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS HONORABLE COURT.

The Indian Gaming Regulatory Act, in Section 2710(d)(7)(B)(iii), requires a threshold judicial finding that a state has failed to negotiate in good faith before any succeeding provisions become operative. The district court made no finding that Alabama had failed to negotiate in good faith, as the matter was resolved on motions to dismiss without

reaching the merits. Appendices B, C and D, infra. Yet, in order to reach the merits, the Eleventh Circuit had to assume jurisdiction and either turn a disputed factual allegation into an adjudicated fact or find that raising the Eleventh Amendment as a defense constitutes a lack of good faith or both.

Despite the fact that the Eleventh Circuit specifically declined to address a critical Tenth Amendment argument, crucial to a resolution of the issue, see Appendix A2-A3, n. 2, the Eleventh Circuit stated:

> Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit.

Seminole Tribe, 11 F.3rd at 1029 (emphasis added). Appendix A67-A68.

Alabama cannot consent to suit. Constitution of Alabama 1901, § 14; Alabama v. Pugh, 438 U.S. 781, 782 (1978),

Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986); and Cabazon Band of Mission Indians v. National Indian Gaming Commission, 827 F.Supp 26, 34 (D.DC. 1993) (_____ F.3rd _____, 1994 WL 19995 (DC Cir. 1994), cert. denied).

Moreover, failing to accept all terms put forth by a Tribe is not, in and of itself, a failure to negotiate in good faith. The Governor of Alabama offered to negotiate a compact for horse, dog and simul-cast races, the only Class III gaming permitted in Alabama. (R1-1-11; R1-1-14 through 16). The Poarch Band demanded casino gambling. Appendix B6-B9. (R1-1-5 through -13) It is one thing to assume that an allegation of bad faith is true for the purpose of testing an affirmative defense. It is another matter entirely to treat an allegation as a finding of fact or assume that it has been adjudicated.

Once the Eleventh Circuit found that it was without subject matter jurisdiction, the matter should have been concluded. Nevertheless, the Eleventh Circuit assumed jurisdiction. Since it tried to turn a disputed factual allegation not decided below into an adjudicated fact, but cannot, the remaining result of its "dicta" is that raising a valid Eleventh Amendment defense to a suit by a Tribe, standing alone, constitutes a lack of good faith and empowers the Eleventh Circuit to design a bypass for the Tribes.[5]

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[5] In subsequent proceedings in Seminole Tribe v. State of Florida, 1993 WL 475999, page 13 (S.D.Fla.) (Sept. 22, 1993), currently stayed on appeal, (Eleventh Circuit No. 93-5256), the district court found that the State of Florida had, in fact, negotiated in good faith.

The Eleventh Circuit reached beyond the issue before it to make a finding which the Court below was without jurisdiction to entertain. Such judicial declarations violate Article III and the Eleventh Amendment.

The unsupported conclusion that a state who raises an Eleventh Amendment defense to suit by a Tribe has shown a lack of good faith not only raises an important question of initial impression, but is also a departure from the usual course of judicial proceedings calling for the supervisory powers of this Court.

IV.

THE DECISION OF THE ELEVENTH CIRCUIT IS ERRONEOUS.

The Eleventh Circuit, after determining that the court below correctly dismissed because it lacked jurisdiction, assumed jurisdiction and in Section V. of its decision also ignored other provisions of IGRA. The Eleventh Circuit remedy

permitting the Tribe to go directly to the Secretary of the Interior for a gaming compact is not found in IGRA.

While such a statutory scheme might be enacted by Congress in the future, it has not yet been done, nor was the issue addressed by the district court. Finding that the Tribe's remedy of suing an unconsenting state in federal court is unavailable does not open the door for the Eleventh Circuit to create a remedy not existing in the statute itself.

In The Apache Tribe of the Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op., (D.C.N.M. Dec. 22, 1992), the court stated:

> As in my order denying the Pueblo of Sandia's motion to amend or alter the dismissal Order in CIV 92-613JC, I further determine that it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation. I have already found that the Eleventh Amendment precludes this action in federal court

> absent waiver by the State of its immunity in a federal forum.

Apache Tribe, CIV 92-076-JC, Slip Op. at 2 (emphasis added).

IGRA contains a process for negotiating and concluding a compact between a Tribe and a State. IGRA provides for suit, and after a judicial finding of either failure to negotiate or to negotiate in good faith, court-enforced negotiation, appointment of a mediator, where necessary, and implementation by the Secretary of the Interior of the compact chosen by the mediator. Succeeding provisions are intertwined with preceding provisions. § 2710(d)(7). Appendix G1-G14.

Congress set forth no procedure for a Tribe to go directly to the Secretary for a compact. In fact, under IGRA, only the mediator's compact is sent directly to the Secretary and that is for **implementation** of the chosen compact, not for creation of

a compact. § 2710(d)(7)(B)(vii)(I). Most importantly, the Secretary's only authority to prescribe procedures is not independent of, but tied to, the process set forth in Sections 2710(d)(7A)(ii) through 2710(d)(B)(vi) of IGRA. Appendix G, infra.

When a court lacks subject matter jurisdiction to act directly, that court cannot, as did the Eleventh Circuit, confer authority on an administrative agency such as the Department of the Interior to do indirectly what Congress has not empowered that agency to do directly. See, e.g., Montana-Dakota Utilities Company v. Northwestern Public Service Commission, 341 U.S. 246 (1951). This Court stated:

> [W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.

Montana-Dakota, 341 U.S. at 254.

Congress intended IGRA to be a means by which the varied public policies of tribal, state and Federal governments could be accommodated and reconciled. S.Rep.No. 100-446, 100th Congress, 1st Sess. 1-5, 1988 U.S. Code Cong. & Admin. News 3076. In Landgraf v. USI Film Products, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994), this Court noted that "[w]e are not free to fashion remedies that Congress has specifically chosen not to extend. See Northwest Airlines, Inc., v. Transportation Workers, 451 U.S. 77, 97 (1981)."

In Sisson, 399 U.S. at 298, this Court noted that a court must respect the limits up to which Congress was prepared to enact a particular policy, particularly when the statute was enacted as a compromise. Under IGRA Indian gaming is

lawful on Indian lands only if: (1) authorized by tribal ordinance; (2) located in a state which permits such gambling for any purpose by any person, entity or organization; and (3) conducted in conformance with a state-tribal compact. A process which totally eliminates state involvement was not intended by Congress. § 2710(d)(1).

V.

THE CONFLICT IN THE CIRCUITS SHOULD BE RESOLVED BY THIS COURT.

The Eighth Circuit, in Cheyenne River Sioux Tribe v. South Dakota, 3 F.3rd 273 (8th Cir. 1993) faced the same issues as the Eleventh Circuit, but reached a different conclusion. Following the statutory provisions of IGRA, the Eighth Circuit held that a state is required to negotiate with a Tribe only over those games authorized by state law. Cheyenne River, 3 F.3rd at 279.

Although Alabama offered to negotiate a compact for horse, dog and simul-cast races, the Poarch Band filed suit seeking full casino gambling. (R1-1-5 through -13) If Alabama were in the Eighth Circuit, Alabama would now be negotiating over those forms of gaming, as those are the only Class III games permitted under Alabama law.

Under the Eleventh Circuit decision, Alabama would be precluded from any participation in the formulation of regulations under which Indian Gaming is conducted in Alabama, if it has raised an Eleventh Amendment defense.

The results of these circuit court decisions interpreting IGRA constitute a conflict in the circuits which should be resolved by this Court.

VI.

BOTH THE INDIAN GAMING REGULATORY ACT AND THE CREATIVE BYPASS DESIGNED BY THE ELEVENTH CIRCUIT VIOLATE THE TENTH AMENDMENT.

After declining to address the Tenth Amendment argument presented in original briefs in this appeal, the Eleventh Circuit proposed a remedy that is foreclosed by the argument the Court failed to consider. The Eleventh Circuit could have addressed the Tenth Amendment argument on the basis that New York v. United States, _____ U.S. _____, 120 L.Ed.2d 120, 112 S.Ct. 2405 (1992), was an intervening decision addressing the issue raised and dispositive of the matter before the Court or that the decision in New York provided an alternate ground for sustaining the judgment of the district court.[6] Since the Eleventh Circuit

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[6]Tenth Amendment challenges to IGRA are currently pending in the Ninth and Tenth Circuits.

addressed a question not considered by the district court -- the remedy -- it should have been considered in its entirety.

Not only does IGRA violate the Tenth Amendment, the Eleventh Circuit remedy violates the Tenth Amendment. Under this suggested remedy, states have two coercive choices -- be sued by the Tribe or assert your immunity and have the Secretary of the Interior prescribe the manner in which Indian gaming will be conducted in your state. This is precisely that which is forbidden in New York v. United States, yet what the Eleventh Circuit declined to address.

CONCLUSION

The petition for a writ of certiorari should be granted and Section V. of the Eleventh Circuit decision vacated.

Respectfully submitted,

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No. 94-35

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor,
State of Alabama, Petitioners,

v.

POARCH CREEK INDIANS and
POARCH BAND OF CREEK INDIANS, Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX	DESCRIPTION	PAGE
APPENDIX A	Opinion of the Court of Appeals for the Eleventh Circuit.....	A1
APPENDIX B	Order of the District Court for the Southern District of Alabama dated October 30, 1991.....	B1
APPENDIX C	Order of the District Court for the Southern District of Alabama dated January 24, 1992.....	C1
APPENDIX D	Order of the District Court for the Southern District of Alabama dated February 20, 1992.....	D1
APPENDIX E	Order denying Rehearing in the Court of Appeals for the Eleventh Circuit.....	E1
APPENDIX F	Order staying Mandate in the Court of Appeals for the Eleventh Circuit.....	F1
APPENDIX G	25 U.S.C. § 2703(8) and 25 U.S.C. § 2710(d).....	G1
APPENDIX H	Article III, § 2, Constitution of the United States.....	H1

APPENDIX A

SEMINOLE TRIBE OF FLORIDA,

Plaintiff-Appellee,

v.

STATE OF FLORIDA, Lawton Chiles,

Governor of the State of Florida,

Defendants-Appellants.

POARCH CREEK INDIANS,

Poarch Band of Creek Indians,

Plaintiff-Appellant,

v.

STATE OF ALABAMA, James E. Folsom,

Governor, State of Alabama

Defendants-Appellees.

Nos. 92-4652, 92-6244.

United States Court of Appeals

Eleventh Circuit

Jan. 18, 1994.

Appeal from the United States District Court for the Southern District of Florida.

Appeal from the United States District Court for the Southern District of Alabama.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

These two consolidated cases present the following issue: whether Congress successfully abrogated the states' Eleventh Amendment sovereign immunity from suit by enacting the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C.

§§ 2701-21).[1] The two district court judges below agreed that IGRA manifested Congress' attempt to abrogate the states' Eleventh Amendment immunity; they disagreed, however, as to whether Congress possesses the power under the Constitution to accomplish that abrogation.

We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Gaming

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[1]Unless so indicated, all cited sections refer to Title 25 of the United States Code.

Commerce Clause, U.S. Const. art. I, §8, cl. 3. Thus, the states retain their sovereign immunity and the federal courts do not have subject-matter jurisdiction over suits brought under IGRA. Accordingly, these cases must be dismissed.

In part I, we provide a brief summary of the Indian Gaming Regulatory Act here at issue. In part II, we set forth the facts relevant to these cases. After establishing our jurisdiction and the appropriate standard of review in part III, we examine the Eleventh Amendment issues in part IV and then analyze the effect of our holding in part V.[2]

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[2]Defendants raise one issue for the first time on appeal: the Tenth Amendment. Citing the Supreme Court's decision in New York v. United States, --- U.S. ---, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), in which the Court held that Congress could not coercively interfere with the reserved powers of the states, defendants contend that IGRA coercively forces the states to negotiate with Indian tribes in violation of the Tenth Amendment.

"It is not the practice of this court to consider issues on appeal that were not raised in the district court." Allen v. Alabama, 728 F.2d 1384, 1387

(Footnote Continued)

In 1987, the Supreme Court held that a state could not enforce its "civil/regulatory" gaming laws in a manner that would prohibit gaming on Indian lands within its borders. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). That decision left Indian gaming largely unregulated by the states; similarly, "existing federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). In an attempt to supply some

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(Footnote Continued)
(11th Cir. 1984); Moore v. Morgan, 922 F.2d 1553, 1556 n. 3 (11th Cir. 1991). Accordingly, we decline to address defendant's contention.

much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the Indian Gaming Regulatory Act. IGRA's primary purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming; §§ 2704-08; and provided a compacting procedure by which states might participate in the regulation of certain forms of Indian gaming, § 2710(d).

Briefly summarized, Congress divided Indian gaming into three "classes." Class I gaming, which is governed and regulated solely by individual Indian tribes, includes little more than "social games solely for prizes of minimal value. . . ." § 2703(6). Class II gaming, which is subject to certain federal regulations, includes bingo and comparable games as well as non-banking card games where not prohibited by law.[3] § 2703(7)(A). Neither of these classes is relevant to the cases on appeal.

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[3]Non-banking card games are those in which the gamblers compete against each other rather than against the house.

These cases address the third class of gaming. Class III gaming is defined residually: it includes "all forms of gaming that are not class I gaming or class II gaming." § 2703(8). Specifically excluded from class II, and therefore within the parameters of class III, are banking card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." § 2703(7)(B). Class III gaming is the type of gaming most profitable to the tribes; it also is the gaming in which the states desire the greatest regulatory oversight.

In order to achieve a compromise between the interests of the states and the interests of the Indian tribes, Congress mandated that class III gaming activities would be lawful on Indian lands only when those activities are (a)

authorized by the tribe; (b) located in a state that permits such gaming; and, most importantly, (c) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." § 2710(d)(1). To ensure that dilatory actions by the state could not preclude or unreasonably delay Indian gaming, IGRA also delineated a negotiating process designed to culminate in the Tribal-State compact and provided mechanisms to remedy state misconduct.

Under the statute, the tribe initiates the compacting process by requesting that the state enter into negotiations for the purpose of concluding a Tribal-State compact governing the conduct of gaming activities; in IGRA, Congress mandated that the state "shall negotiate with the

Indian tribe in good faith to enter into a compact." § 2710(d)(3)(A). If these negotiations bear fruit, the compact must be approved by the Secretary of the Interior and published in the Federal Register. § 2710(d)(8).

Congress also anticipated that Tribal-State negotiations would not always produce a mutually satisfactory compact; it thus provided tribes with a remedy in the federal courts:

> (A) The United States district courts shall have jurisdiction over --
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State

> compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 27109(d)(7)(A)(i) & (B)(i). If the district court finds that the state indeed has failed to negotiate in good faith, that court "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If that fails, "the Indian tribe and the State shall each submit to a mediator appointed by

the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator then selects the better of the two proposals and submits it to the tribe and the state. The states then either may consent to the compact within sixty days, in which case the compact is treated as if it were the product of negotiations; or may refuse to consent, in which case the Secretary of the Interior provides procedures to regulate the tribe's class III gaming. § 2710(d)(7)(B)(vi) & (vii).

Defendants in these two cases assert that the federal jurisdiction granted by § 2710(d)(7) is contrary to their Eleventh Amendment sovereign immunity and demand that the tribes' cases be dismissed.

II.

The facts of these cases are few and easily summarized. The first case, Seminole Tribe of Florida v. Florida, No. 92-4652, was filed by the Seminole Tribe, federally recognized as a tribe under Section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (West 1983 & Supp. 1993). The complaint, filed in the Southern District of Florida on September 19, 1991, asserted jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i) and alleged that the State of Florida and its governor, Lawton Chiles, had "failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith." Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction based on the

sovereign immunity enjoyed by the State of Florida and the Governor of Florida under the Eleventh Amendment. On June 18, 1992, the district court denied the motion, 801 F.Supp. 655 (S.D.Fla.1992) ("Seminole"), and this interlocutory appeal ensued.

The second case, Poarch Band of Creek Indians v. Alabama, No. 92-6244, presents a similar initial fact pattern. The Poarch Band, also a federally recognized tribe, filed suit against the State of Alabama and its governor, Guy Hunt (for whom the current governor, James E. Folsom, Jr., has been substituted), on September 11, 1991. Also asserting jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i), the complaint is designed to resolve for the State and the Tribe various questions regarding IGRA's definition of class III

gaming. The State of Alabama's answer claimed a defense of sovereign immunity under the Eleventh Amendment; the district court granted the State's subsequent motion to dismiss based upon this defense on October 30, 1991. 776 F.Supp. 550 (S.D. Ala. 1991) ("Poarch I").[4] The governor also filed an Eleventh-Amendment-based motion to dismiss; the district court granted it on February 20, 1992, thus dismissing the final defendant and terminating the Poarch Band's suit. 784 F.Supp. 1549 (S.D.Ala. 1992) ("Poarch II"). It is

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[4]The district court dismissed the State of Alabama from the Poarch Band's amended complaint in an unpublished order dated January 24, 1992.

from these orders that the Poarch Band appeals.

III.

[1, 2] We have jurisdiction over these consolidated cases pursuant to 28 U.S.C. § 1291. In Poarch I and Poarch II, the district court granted defendants' sovereign-immunity-based motions to dismiss, thus terminating the tribe's suit and giving rise to our appellate jurisdiction over final orders. Our jurisdiction in Seminole arises from the district court's denial of defendants' motion to dismiss based on sovereign immunity; such a denial grants defendants the right of an immediate, interlocutory appeal. See Griesel v. Hamlin, 963 F.2d 338, 340 (11th Cir. 1992).

The granting or denial of a sovereign immunity defense is an issue

of law subject to de novo review by this court. McDonald v. Hillsborough County School Bd., 821 F.2d 1563, 1554 (11th Cir. 1987).

IV.

[3] For more than a century, judicial interpretation of the Eleventh Amendment has far exceeded the apparent scope of the amendment's actual provisions. The scope of the "textual" amendment is rather limited and serves only to restrict the Article III diversity jurisdiction of the federal courts:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by

> Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

In 1890, however, the Supreme Court rejected this facial reading. In Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Court recognized that the Eleventh Amendment "reflected . . . a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." Pennsylvania v. Union Gas Co., 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297, 105 L.Ed.2d 1 (1989) (Scalia, J., concurring in part and dissenting in part). Thus, the Court determined that the principle of

sovereign immunity, although omitted from the text of the Constitution, survived the Constitutional Convention.

It did not survive untarnished, however; the Court subsequently has held that the states' immunity is not absolute. More specifically, the states are not immune from suit if the circumstances indicate consent, abrogation, or the fiction of Ex parte Young. If none of these three exceptions applies, however, the Eleventh Amendment serves as a jurisdictional bar to the suit. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). We address each exception to Eleventh Amendment immunity in turn.

A.

[4, 5] First, the Supreme Court has held that the states may not rely on the defense of sovereign immunity if they have consented to suit. A court may find consent in three circumstances. The clearest of the three, known as express consent, usually takes the form of legislative enactment. The second form of consent derives from the states' ratification of the Constitution. This "plan of the convention" consent assumes that, by ratifying the Constitution and joining the republic, each state ceded certain powers to the federal system; implicit in this cession is the understanding that the state necessarily also consented to suit in certain cases. Thus, the Court has held that, by ratifying the Constitution, the states

waived their immunity to suits by the United States, see, e.g., United States v. Texas, 143 U.S. 621, 641-46, 12 S.Ct. 488, 492-94, 36 L.Ed. 285 (1892); and by sister states, see, e.g., South Dakota v. North Carolina, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904). Finally, the Court has created a third, extremely limited category of consent. This consent is premised on the state's participation in a congressional program which, as a prerequisite for participation, mandates that the state consent to suit. The Court has found this form of consent to exist in only one case: Parden v. Terminal Railway of Alabama, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

We find that neither Alabama nor Florida has consented to a suit under IGRA.

[6] Express waivers of a state's Eleventh Amendment sovereign immunity must be explicitly authorized by the state "in its Constitution, statutes and decisions." Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 467, 65 S.Ct. 347, 352, 89 L.Ed. 389 (1945)). See also Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Alabama defendants cite Article I, section 14 of the Alabama Constitution, which specifically reserves Alabama's sovereign immunity, and claim that Alabama therefore could not have consented to a suit under IGRA. Even though Florida has not raised a similar defense, plaintiffs have failed to demonstrate that either state has given

express consent to this suit. Therefore, we find that the states have not expressly waived their Eleventh Amendment sovereign immunity.

2.

[7] Nor does "plan of the convention" consent imperil the states' sovereign immunity. Three terms ago, the Supreme Court addressed the question whether the states, by ratifying the Constitution, had surrendered their sovereign immunity to suits by Indian tribes. The court compared suits brought by sister states to suits brought by Indian tribes and held that the states had not waived their sovereign immunity to suits brought by Indian tribes under the "plan of the convention":

> What makes the States' surrender of immunity from suit by sister States

> plausible is the mutuality of the concession. There is no such mutuality with either foreign sovereigns or Indian tribes. . . . [I]f the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak, --- U.S. ---, ---- -- ----, 111 S.Ct. 2578, 2582-83, 115 L.Ed.2d 686 (1991) (emphasis in original). The Court's holding in Blatchford governs our resolution of this issue. Thus, we hold that the states cannot be said to have surrendered their sovereign immunity under the "plan of the convention."

[8] Finally, the tribes assert that both Florida and Alabama have consented to this suit by participating in negotiations under IGRA. Invoking Parden, 377 U.S. 184, 84 S.Ct. 1207 (1964), the tribes assert that the states have attempted to reap the benefits of IGRA and therefore should be held to have consented to the downside of the statute, specifically, federal jurisdiction over the present suits. We disagree.

In Parden, the Supreme Court for the first--and, to date, last--time found that a state had waived its immunity to suit by participating in a federal program mandating that participants consent to suit. The facts of that case, as well as subsequent

Supreme Court decisions, render Parden inapplicable to the appeals at hand.

First, it is apparent that Parden was decided largely on its facts. In that case, the State of Alabama had operated a for-profit, state-owned railroad for twenty years. By operating the railroad in interstate commerce, Alabama effectively had transcended the typical realm of state authority by entering the private market, a market in which all employers were subject to the strictures passed by Congress. The limited holding of the Court was that, based on these facts, Alabama should be subject to the same requirements as the other (private) participants in the private market; one of those requirements was that all market actors consent to suit. These cases involve state governments negotiating with

sovereign tribes located within the states' borders--hardly a "private" activity--and thus do not raise the same concerns that prompted the Supreme Court's unique decision in Parden.

Second, later decisions of the Supreme Court limit Parden and indicate that Alabama and Florida cannot be said to have consented to suit in this case. First, in Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), the Court declined to extend Parden to circumstances in which a state was operating a non-profit hospital facility, a traditional state activity. The next year, in Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court refused to find Parden-style consent when Illinois participated in a federal program by

agreeing to administer federal and state funds in accordance with federal law. The Court reiterated this holding a decade later in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 121 (1985). Finally, the Court further limited Parden in Welch v. Texas Dep't. of Highways and Public Transp., 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). In fact, in no other case has the Court found consent pursuant to its Parden decision.

When Parden and its progeny are examined closely, it is apparent that, although Parden may not be entirely dead, it certainly is not quick enough to breath life into the Indian tribes' claims in these cases. In these cases, the states were faced with a Hobson's choice: refuse to negotiate with the

tribes, and therefore be subject to suit under IGRA; or negotiate with the tribes, and therefore (according to the tribes' argument) consent to suit under IGRA. Thus, we cannot find the same voluntary, for-profit, private-enterprise operation involved in Parden and decline to hold that Alabama and Florida consented to suit.[5]

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[5]One sister circuit, in determining that the Eleventh Amendment did not bar suits under IGRA, mentioned that the state had "actively engaged in negotiating tribal-State compacts and ha[d] reaped the benefits from these negotiations." See Cheyenne River Sioux Tribe v. State of South Dakota, 3 F.3d

(Footnote Continued)

Thus, we find that neither Florida nor Alabama consented, either expressly,

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(Footnote Continued)
273 (8th Cir. 1993) ("Cheyenne II") aff'd 830 F.Supp. 523 (D.S.D. 1993) ("Cheyenne I"). As the Eighth Circuit Court of Appeals primarily rested its decision on the fact that Congress had abrogated the state's Eleventh Amendment immunity, an argument we discuss (and reject) in part III.B., below, it is not clear how much weight the court gave to the state's participation in negotiations. To the extent that the Eighth Circuit relied on South Dakota's negotiations as a basis for finding a waiver of sovereign immunity, we respectfully disagree.

implicitly, or by conduct under Parden, to suit in federal court under IGRA.

B.

[9] In defining the second sovereign immunity exception, the Supreme Court has held that states also may not rely on the defense of sovereign immunity if Congress has specifically abrogated that defense when legislating pursuant to certain of its plenary powers. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (finding abrogation in legislation passed pursuant to § 5 of the Fourteenth Amendment), and Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d (1989) (finding abrogation in legislation passed pursuant to the Congress' Article I, § 8 plenary power over commerce). The Court has not yet found that

Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

The tribes' most significant argument is that Congress abrogated the states' Eleventh Amendment immunity when it granted jurisdiction to the district courts in 25 U.S.C. § 2710(d). The district court in Seminole, as well as one sister court of appeals and a handful of district courts, have adopted the tribes' position.[6] We disagree,

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[6] See Cheyenne II, supra; Kickapoo Tribe of Indians v. Kansas, 818 F.Supp. 1423 (D.Kan. 1993); Cheyenne I, supra; Seminole, supra.

believing that Congress, when it enacted IGRA pursuant to the Indian Commerce Clause, lacked the power to abrogate the states' sovereign immunity.[7]

When determining whether Congress has abrogated the states' Eleventh Amendment immunity, we must conduct a two-part inquiry. We first must

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[7]Other courts all have held that Congress lacked abrogation power when it enacted IGRA. See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F.Supp. 1484 (W.D.Mich. 1992); Ponca Tribe of Oklahoma v. Oklahoma, 834 F.Supp. 1341 (W.D.Okla. 1992); Spokane Tribe of Indians v. Washington, 790 F.Supp. 1057 (E.D. Wash. 1991), Poarch I, supra.

determine that the "evidence of congressional intent [to abrogate the states' immunity is] both unequivocal and textual." Dellmuth v. Muth, 491 U.S. 223, 230, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989) (citing Atascadero, 473 U.S. at 242, 105 S.Ct. at 3147). We also must find that Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity. We hold that Congress expressed its intent sufficiently to survive the first prong of this inquiry. That intent can not be given effect, however, as Congress did not possess the power to abrogate the states' immunity when it enacted IGRA.

1.

[10] Several courts have addressed the question whether Congress unequivocally intended to abrogate the states' immunity when it enacted IGRA. Those courts have had little difficulty concluding that Congress' intent was sufficiently clear. See, e.g., Cheyenne II, supra; Kickapoo, 818 F.Supp. at 1427 ("[A] clearer statement of the intent to abrogate is difficult to envision."); Seminole, 801 F.Supp. at 658; Sault Ste. Marie, 800 F.Supp. at 1489 ("clear statement of waiver"); Poarch I, 776 F.Supp. at 557; Ponca, supra. We believe the question not so easily resolved.

In Dellmuth, the Supreme Court reiterated its earlier holdings that a Congressional declaration abrogating the states' Eleventh Amendment sovereign

immunity must be explicit: "As we made plain in Atascadero, ' [a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' 473 U.S. at 246, 105 S.Ct. at 3149." 491 U.S. at 231, 109 S.Ct. at 2402. At first glance, it would appear that IGRA fails that test: Instead of specifically abrogating the states' immunity, section 2710(d)(7)(A) states only that "[t]he United States district courts shall have jurisdiction. . . ." The mere granting of jurisdiction is not equivalent to the abrogation of a defense.

A closer examination of IGRA, however, reveals that, despite Congress' omission of a specific abrogation clause, Congress nonetheless manifested its intent to abrogate the states'

immunity. IGRA gives the federal district courts jurisdiction over three types of cases, the first of which is "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." § 2710(d)(7)(A)(i). The only possible defendant to such a suit is a state (see part IV(C), below). Thus, unless Congress intended to abrogate the states' immunity, this portion of IGRA would be of no effect. Charged as we are with the task of giving effect to each portion of a statute, we must conclude that Congress intended to abrogate the states' sovereign

immunity.[8] Thus, we hold that the first

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[8]This conclusion is bolstered by Justice Scalia's opinion in Dellmuth. Concurring with the Court's majority opinion, Justice Scalia noted that the majority's "reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to State sovereign immunity or the Eleventh Amendment." 491 U.S. at 233, 109 S.Ct. at 2403 (Scalia, J., concurring). Although the facts of that case differ slightly from the case before us, it is clear that Congress in enacting IGRA "clearly subject[ed] States to suit" in § 2710(d)(7).

prong of our inquiry is satisfied.

2.

More important, and less easily met, is the second prong of our inquiry: whether Congress possessed the constitutional power to abrogate the states' immunity when it enacted IGRA. To resolve this issue, we initially must determine under which provision(s) of the Constitution Congress enacted IGRA (see sub-part a). Only then can we determine whether Congress possessed the power to abrogate the states' immunities (see sub-part b).

a.

Congress may pass legislation only when the Constitution gives it the authority to do so. As we mentioned earlier, the Supreme Court has held that Congress possesses abrogation powers only when it enacts legislation under

the auspices of (1) Section 5 of the Fourteenth Amendment or (2) the Interstate Commerce Clause. Plaintiff tribes urge us to find that IGRA was passed not only pursuant to the Indian Commerce Clause, but also pursuant to Section 5 and the Interstate Commerce Clause.[9] We cannot so find.

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[9]Both the so-called Commerce Clause and the so-called Interstate Commerce Clause derive from the same constitutional grant of plenary power to Congress in Article I: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl.

(Footnote Continued)

[11] First, as to the Fourteenth Amendment, plaintiff tribes claim that Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (holding that Congress may abrogate

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(Footnote Continued)
3. Although the Interstate and Indian Commerce Clauses are contained in the same textual provision, the purposes that prompted their inclusion in the Constitution, as well as their subsequent legal interpretations, are distinct. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) ("It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications.").

states' sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment), controls, thus granting Congress the authority to abrogate the states' immunity in IGRA. To justify this contention, the tribes assert that IGRA creates both a liberty interest and a property interest in the tribes and their members. Neither of these claimed interests, however, find support in the Supreme Court's Fourteenth Amendment jurisprudence.

The alleged liberty interest, the tribes claim, arises from the Supreme Court's holding in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Stating that the states' input in IGRA is akin to a licensing requirement, the tribes assert that the states' failure to enter a compact operates exactly as an

unconstitutional denial of a license. The alleged property interest likewise is derived from Roth. What the tribes fail to recognize, however, is that these interests are created only when the claimant has "a legitimate claim of entitlement." Id. at 577, 92 S.Ct. at 2709. The tribes' bald assertion that IGRA creates such a claim ignores the discretionary nature of the compacting process envisioned by IGRA. IGRA does not create an entitlement to operate gambling operations; rather, it establishes the process and standards by which gambling may be conducted on Indian lands. Thus, IGRA creates no liberty or property interests and cannot implicate the Fourteenth Amendment.

[12] Second, the tribes, noting that Congress' goals in enacting IGRA included "shield[ing] [Indian gaming]

from organized crime and other corrupting influences," § 2702(2), assert that Congress necessarily enacted IGRA pursuant to the Interstate Commerce Clause. The tribes look to the legislative history of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922 (1970), to find Congressional reasoning that organized crime burdens interstate commerce. 84 Stat. at 923. The tribes thus conclude that, since Congress meant to address organized crime by enacting IGRA, it passed IGRA under the Interstate Commerce Clause.

We disagree. As § 2702(2) makes clear, Congress' concern with organized crime was not that such activities would burden interstate commerce, but rather that prohibition of organized crime would "ensure that the Indian tribe is

the primary beneficiary of the gaming operation, and . . . assure that gaming is conducted fairly and honestly by both the operator and the players." § 2702(2). In addition, Congress wanted to criminalize the involvement of organized crime in order to "promote[] tribal economic development, self-sufficiency, and strong tribal government." § 2702(1). In analyzing Congress' goals, it is clear that alleviating a supposed burden on interstate commerce was not among them.

Having excluded the possibility that Congress enacted IGRA under either the Interstate Commerce Clause or Section 5 of the Fourteenth Amendment, we must conclude that Congress enacted IGRA solely under the Indian Commerce Clause. The Supreme Court's jurisprudence on the Indian Commerce

Clause bolsters our conclusion that Congress enacted IGRA solely under that authority. See Cotton Petroleum, 490 U.S. at 192, 109 S.Ct. at 1716 ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

b.

[13] Having determined that Congress enacted IGRA solely under the Indian Commerce Clause, we now must determine whether the Indian Commerce Clause permits Congress to abrogate the states' Eleventh Amendment immunity. We conclude that it does not.

The Supreme Court case most relevant to this issue is Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). In that case, involving a badly fractured Court,

a four-member plurality[10] held that Congress had the power to abrogate the states' Eleventh Amendment immunity when enacting legislation pursuant to the Interstate Commerce Clause. The plurality stated that, since the Interstate Commerce Clause

> withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave

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[10]Justice Brennan authored the opinion; Justices Marshall, Blackmun, and Stevens joined.

> Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Id. at 19-20, 109 S.Ct. at 2284. Thus, the Court held that the State of Pennsylvania could not invoke sovereign immunity in defending a suit for money damages under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and the Superfund Amendments and Reauthorization

Act of 1986 ("SARA"), 42 U.S.C. § 9601 et seq.[11]

In a cryptic concurring opinion, Justice White agreed with Justice Brennan's conclusion that Congress had the authority to abrogate the states' immunity; however, he also stated that he did not "agree with much of [Justice Brennan's] reasoning," id. at 57, 109 S.Ct. at 2295 (White, J., concurring).[12] It is regrettable that

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[11]Congress passed both CERCLA and SARA pursuant to the Interstate Commerce Clause.

[12]Justice White's uneasiness is understandable given the questionable

(Footnote Continued)

Justice White failed to provide any

(Footnote Continued)
foundation on which Justice Brennan built his argument. His plurality opinion contains three significant weaknesses: (1) it disregards the Supreme Court's statements that Parden v. Terminal Railway of Alabama, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), was a waiver case, not an abrogation case; (2) it misconstrues Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), by ignoring that it too, solely addressed whether Congress had mandated that Missouri consent to suit before operating a hospital. (Thus, it also

(Footnote Continued)

reasoning of his own to support his conclusion that Congress had abrogation power as his vague concurrence renders the continuing validity of Union Gas in doubt. The other four justices

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was not an abrogation case.); and, (3) it appeared to afford precedential value to two cases, Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), and County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), in which the Court assumed that Congress had abrogation power, but specifically denied "deciding, or intimating a view of the question." Welch, 483 U.S. at 475, 107 S.Ct. at 2947.

fervently opposed the plurality's holding.

Some courts have noted not only that there are weaknesses in the Union Gas Court's holding, but also that changes in the composition of the Court make it likely that a majority of the present Court would disagree with Union Gas and find that Congress was not empowered to abrogate the states' immunity. Unlike those courts, we refuse to disregard Union Gas merely on these bases. Nonetheless, when examined in the proper light, Union Gas is distinguishable from the cases before us and does not govern our disposition of this issue. Our conclusion that Congress did not have the power, when enacting IGRA, to abrogate the states' Eleventh Amendment sovereign immunity is supported by two lines of argument.

First, the tribes begin their argument by assuming that Union Gas controls all Commerce Clause cases, Indian as well as Interstate; thus, they assert, we are obligated to hold that Congress successfully abrogated the states' immunity when it passed IGRA.[13]

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[13]The tribes assert that the Union Gas Court used the term "Commerce Clause," not "Interstate Commerce Clause," thus evidencing its intention to grant Congress abrogation powers whenever it acted pursuant to any of the Commerce Clauses, Interstate, Indian, or Foreign. The Court's entire discussion, as well as every case it cited, focused solely on the Interstate Commerce

(Footnote Continued)

We believe it appropriate, however, to limit Union Gas to the factual situation before that Court: the exercise of Congress' power to legislate under the Interstate Commerce Clause. CERCLA and SARA were passed pursuant to the Interstate Commerce Clause, not the Indian Commerce Clause. In addition, each of the opinions -- plurality, concurrences, and dissents -- addressed only the Interstate Commerce Clause. Moreover, the opinions do not suggest that the Union Gas holding should be broadly construed. Thus, a fair reading

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(Footnote Continued)
Clause. We therefore conclude that the Court's discussion, although imprecise, implicated only the Interstate Commerce Clause.

of Union Gas is one that limits Congress' abrogation powers to laws passed under the Interstate Commerce Clause. As we already have determined that IGRA was passed pursuant to the Indian Commerce Clause, the Union Gas holding does not control our disposition of this case.

This conclusion is bolstered by the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause. In an attempt to demonstrate this point, defendants suggest that Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) (explaining that "the Interstate Commerce and Indian Commerce Clauses have different applications"), governs our disposition of these cases. That case, which dealt solely with preemption

and multiple taxation issues, plainly is distinguishable from the facts before us; thus, the Cotton Petroleum Court's conclusion that the Commerce Clause distinguishes between states and Indian tribes is neither surprising nor controlling precedent. Although not directly on point, however, much of the reasoning that supported Cotton Petroleum sheds light on the present issue. In that case, the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states in order to "maintain[] free trade among the States." Id. By contrast, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Id. Although Congress has the power to limit

the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated distinctly. As a result, the unique abrogation power afforded Congress under the Interstate Commerce Clause in Union Gas cannot be extended to the Indian Commerce Clause.

A second argument supporting our conclusion that Congress did not possess the power to abrogate the states' immunity is that a proper reading of Union Gas and the cases cited therein demonstrates that the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals. For instance, in Parden, a case on which the Union Gas plurality primarily relied, the State of Alabama was operating a for-profit railroad in interstate

commerce. Likewise, in Union Gas itself, the State of Pennsylvania was an "owner or operator" of land and therefore, like private citizens, was subject to liability under SARA. On the contrary, when the State of Missouri operated a non-proprietary, not-for-profit hospital (a non-private activity "wholly within [the states'] sphere of authority") the Court refused to find that Congress mandated federal jurisdiction. Employees, 411 U.S. at 282, 93 S.Ct. at 1617 (1973).

In this case, the tribes seek to impose jurisdiction over the States of Alabama and Florida for their failure to negotiate a compact with the tribes. Rather than being a typically private activity, such negotiations are "wholly within [the states'] sphere of authority." We believe the Supreme

Court's jurisprudence clearly evinces an intent to allow federal jurisdiction over states only when the state's conduct is outside the typical realm of state authority. As negotiations with tribes certainly are not outside that realm of authority, the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity. Thus, even if Union Gas' reasoning were to give Congress abrogation power under the Indian Commerce Clause in general, we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

For these reasons, we conclude that Congress did not possess the power to

abrogate the states' Eleventh Amendment immunity when it enacted IGRA.

C.

[14] Third, the Supreme Court has created a third exception to the doctrine of sovereign immunity by holding that the Eleventh Amendment does not always provide immunity to government officials; in certain circumstances, those officials may be subject to suit, despite the Eleventh Amendment, under the "fiction" of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Briefly, the fiction allows an individual to obtain a federal injunction against a state officer to force the officer to comply with federal law. Id. at 160, 28 S.Ct. at 454. Under the fiction, the tribes assert that they may sue the governors

of Alabama and Florida to compel negotiations under IGRA.

[15, 16] The Ex parte Young doctrine does not apply in two cases: (1) it cannot be used to compel an executive official to undertake a discretionary task; and (2) it cannot be used if the suit is, in reality, against the state. As most of the courts that have addressed this issue have found, however, the tribes' claims fit into both categories. See, e.g., Poarch II, 784 F.Supp. at 1551-52; Poarch I, 776 F.Supp. at 562; and Ponca, supra.[14]

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[14]The only case to disagree is Spokane, 790 F.Supp. at 1062-63. There, the court focused on the need for a

(Footnote Continued)

[17] First, the Ex parte Young doctrine cannot compel discretionary acts. Ex parte Young, 209 U.S. at 158, 28 S.Ct. at 453. IGRA does not allot merely ministerial acts to the state, however; rather, it provides for the negotiation of a contract, the terms of

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(Footnote Continued)
forum in which the tribe could air its grievances. The need for a forum, however, does not provide a federal court with the power to override state officials' constitutionally mandated sovereign immunity. Federal court jurisdiction is subject to and limited by the dictates of the Eleventh Amendment, and one judge's desire to give an aggrieved party a remedy does not enlarge it.

which are left to the discretion of the state and the tribe. Likewise, since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion. Thus, both of these facets of IGRA's compacting process demonstrate that the governors must use their discretion; accordingly, under the first exception to the Ex parte Young doctrine, the governors retain their Eleventh Amendment sovereign immunity.

[18] Second, if a suit in reality is against the state itself, the Ex parte Young doctrine is inapplicable. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-09, 79 L.Ed.2d 67 (1984). IGRA uniformly addresses itself to "the State"; not once does it impose

duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.). Even the district court's injunctive relief powers are limited to ordering "the State and the Indian Tribe to conclude" a compact. § 2710(d)(7)(B)(iii) (emphasis added). In addition, IGRA mandates that the State negotiate, conclude, and abide by the Tribal-State compact. It is apparent that these suits are not against officials in an attempt to force them to follow federal law; rather, the suits are against the states for failing to negotiate a compact in good faith. As a result, the doctrine of Ex parte Young does not apply.

Unless one of the three exceptions -- consent, abrogation, or Ex parte Young -- applies, the Eleventh Amendment

serves as a jurisdictional bar and precludes federal court adjudication over these suits. As we have found that none of the exceptions is applicable to IGRA, these cases must be dismissed for lack of subject-matter jurisdiction.

V.

[19] As a result of our holding that the federal courts do not have jurisdiction to reach the issues brought by the tribes in these two suits, the procedures found in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit.[15]

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[15]A state may consent to suit, in which case these provisions remain in

(Footnote Continued)

The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause. § 2721; and we find no "strong evidence" to ignore that plain congressional directive. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the

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full force. See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson, No. Civ-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. July 20, 1993), in which defendants waived their Eleventh Amendment immunity.

question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

VI.

The decision of the United States District Court for the Southern District of Florida in Seminole Tribe of Florida v. Florida, No. 92-4652, is reversed; the case is remanded so that the district court may dismiss the suit. The decisions of the United States District Court for the Southern District of Alabama in Poarch Band of Creek Indians v. Alabama, No. 92-6244, are affirmed.

IT IS SO ORDERED.

BLACK, Circuit Judge, specially concurring.

I concur in the result.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

POARCH BAND OF CREEK INDIANS, Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	NO.91-0757-AH-M
STATE OF ALABAMA and GUY HUNT, Governor of the State of Alabama Defendants.	)	

ORDER

This matter is before the Court on the Motion to Strike of defendant Guy Hunt [Doc. #4], the Motion to Dismiss of the defendant State of Alabama [Doc. #6], and the plaintiff's Motion to Amend Complaint [Doc. #12].

A hearing was held in this Court on the State of Alabama's Motion to Dismiss on October 17, 1991. The Court has fully reviewed the Motion to Dismiss, the briefs and evidentiary materials filed in support of and in opposition to the motion, and all other relevant materials in the file. For the reasons that follow, the Court concludes that the State of Alabama's Motion to Dismiss [Doc. #6] should be GRANTED. The Court also concludes that the Governor's Motion to Strike [Doc. #4] should be DENIED and the plaintiff's Motion to Amend Complaint [Doc. #12] should be GRANTED.

I. THE INDIAN GAMING REGULATION ACT

The Indian Gaming Regulation Act, 25 U.S.C. § 2701 et seq ("IGRA") sets out "to provide a statutory basis for the operation of gaming by Indian tribes

as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1) (West Supp. 1991). The IGRA provides that "[a]ny State and Indian Tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe," and that upon receiving a request from an Indian tribe "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3) (A)&(B) (West Supp. 1991).

The IGRA divides Indian gaming into three classes and establishes a National Indian Gaming Commission within the Department of the Interior to monitor and regulate Indian Gaming. See U.S.C. § 2704-08 (West Supp. 1991). Class I includes social games solely for prizes

of minimal value and traditional forms of Indian gaming engaged in by individuals in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6) (West Supp. 1991). Class II includes bingo and nonbanking card games, as well as banking card games operated on or before May 1, 1988. 25 U.S.C. § 2703(7) (West Supp. 1991). Class III includes all other forms of gaming. 25 U.S.C. § 2703(8) (West Supp. 1991). Class I gaming on Indian lands is within the exclusive jurisdiction of the tribes. 25 U.S.C. § 2710(a)(1) (West Supp. 1991). Class II gaming is within the jurisdiction of the tribes, but is subject to the IGRA. 25 U.S.C. § 2710(a)(2) (West Supp. 1991). A tribe may engage in or license or regulate class II gaming if the state permits such gaming for any purpose by any

person and such gaming is not specifically prohibited on Indian lands by federal law and the governing body of the tribe adopts an ordinance or resolution which is approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. § 2710(b)(1)(A)&(B) (West Supp. 1991). Class III gaming activities are lawful only if they are authorized by a tribal resolution approved by the Chairman, located in a state that permits such gaming for any purpose by any person, and conducted in conformance with a tribal-state compact. 25 U.S.C. § (d)(1)(A)-(C) (West Supp. 1991). See 42 C.J.S. Indians § 64 (1991).

II. PROCEDURAL HISTORY OF THIS CASE

The Poarch Band of Creek Indians (the "Tribe") filed this suit under the IGRA against Governor Guy Hunt (the

"Governor") and the State of Alabama (the "State" or "Alabama") on September 11, 1991, alleging that more than 180 days had passed since the Tribe requested the State to negotiate with it regarding Class III gaming and that the State failed to enter into a compact within the one-year time limit provided by statute.

The Tribe's claim for relief asks for judgement as follows:

> 1. Declaring that the Gaming Act requires Alabama to permit all Class III gaming (except for a lottery which is expressly prohibited by the Constitution of Alabama), including but not limited to, raffles, pari-mutuel betting, video games of chance, facsimile slot machines, nonbank and bank card games, blackjack, baccarat and

chemin de fer, roulette, craps, keno, bingolet, bingo jack, bingo craps, facsimile machine poker, horse and dog racing, simulcasting of horse and dog races and other sporting events, and related games, when defined as Class III gaming, be included in the Compact;

2. Entering an order directing the Governor (on behalf of the State) and the Tribe to sign within 14 days the Tribe's last proposed Compact (except for the present locations being the tribal lands in Escambia and Elmore Counties as agreed)

on the ground that said Compact best comports with the terms of the Gaming Act and applicable Federal law concerning the conduct of Class III gaming activities on tribal

lands, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv).

3. Awarding plaintiff its costs and disbursements herein, including attorney's fees; and

4. Awarding plaintiff such other and further relief as this Court deems just, including, but not limited to, such additional declaratory or injunctive relief as may be necessary to effectuate the purposes of the Gaming Act.

[Plaintiff's Complaint, pp. 15-16]

The Governor answered and filed a motion to strike allegations of good or bad faith on the part of any of the parties as irrelevant. [Doc. #4] The State answered and filed a motion to dismiss based on sovereign immunity under the Eleventh Amendment or for improper venue. [Docs. #5-6]

On October 11, 1991, the plaintiff moved the Court to amend its complaint to request the following relief:

> 1) an order by this Court requiring good-faith negotiations for a time period of up to sixty (60) days between the Governor and the Tribe to agree on a compact;
>
> 2) in the event a compact is not reached, an order by this Court requiring a subsequent mediation process of up to, but not exceeding, sixty (60) days; and
>
> 3) subsequent procedures as set forth in the IGRA.

[Motion to Amend Complaint, Doc. 12, pp. 2-3]

III. THE STATE OF ALABAMA'S MOTION TO DISMISS

The Eleventh Amendment to the Federal Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. While the amendment does not explicitly refer to suits against a state by one of its own citizens, such suits are barred by the amendment. Hans v. State of Louisiana, 134 U.S. 1, 21, 10 S.Ct. 504, 509, 33 L.Ed. 842 (1890); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). In fact, as the United States Supreme Court recently explained,

> [d]espite the narrowness of its terms, since Hans v. Louisiana we

> have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a state will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, --- U.S. ---, ---, 111 S.Ct. 2578, 2581 (1991) (citations omitted).

The Eleventh Amendment does not act as a complete bar to all suits against a state, and there are three

well-recognized exceptions. First, a state may consent to suit and in so doing waive the protection against suit afforded it by the Eleventh Amendment. Second, Congress can, under some circumstances, abrogate a state's Eleventh Amendment immunity. Finally, the Ex Parte Young doctrine, resting on an ultra vires theory, permits suits against state officials in their official capacities to obtain prospective injunctive relief in order to promote the vindication of federal rights.

An examination of each of these potential exceptions reveals that none of them are applicable in this case and that the Eleventh Amendment remains as a bar to this action against the State of Alabama.

A. Consent/Waiver

The Supreme Court has explained that "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81." Monaco v. Mississippi, 292 U.S. 313, 322-23, 54 S.Ct. 745, 747-48, 78 L.Ed. 1282 (1934); See also Pennhurst State School and Hospital v. Halderman, 456 U.S. 89, 98-100, 104 S.Ct. 900, 906-907, 79 L.Ed.2d 67 (1984). There are thus two forms of consent: An explicit consent by the state to a particular lawsuit against it and that consent deemed given by the state when it joined the Union and adopted the United States Constitution.

1. **Express Consent or Waiver**

The first type of consent is explicit case-by-case consent and presents no federal constitutional problems when properly given. See, e.g. Petty v. Tennessee-Missouri Bridge Com'n, 359 U.S. 275, 79 S.Ct. 785 (1959); Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883). Express consent must be through legislative enactment, Carr v. City of Florence, Ala., 916 F.2d 1521, 1524 (11th Cir. 1990), and the mere failure by a state to raise the Eleventh Amendment as a defense in the trial court does not waive it. Edelman v. Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974).

The plaintiff asserts that the State of Alabama has expressly consented to this suit. According to its brief,

the plaintiff Indian Tribe was considering filing suit solely against the Governor and only added the State as a party because the Attorney General's office took the position that if the State was not named a party, then the Attorney General's office would seek to intervene in this lawsuit on behalf of the State. The plaintiff also finds consent to suit in the fact that the State entered into compact negotiations with the Indian tribe.

It might be difficult to determine whether either of these actions by the State of Alabama could aptly be characterized as an "intentional relinquishment" of its constitutional right not to be sued without its consent, Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), but this Court is spared

such a difficult determination by the requirement that a state's consent or waiver come by way of legislative enactment. Carr, 916 F.2d at 1524. There has been no consent to suit or waiver of Eleventh Amendment immunity by the Alabama legislature in this case, and accordingly there is no express consent or waiver by the State of Alabama.[1]

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[1]Whether such a legislative enactment could function as a valid express consent to suit is also a difficult question, See Ala. Const. of 1901, Article I, section 14 ("the State of Alabama shall never be made a defendant in any court of law or

(Footnote Continued)

2. Consent Inherent in the Plan of the Convention

The second type of consent, that inherent "in the plan of the convention," has been found to exist in several situations. One is a waiver of immunity against suits by the United States. United States v. Mississippi, 380 U.S. 128, 140-41, 85 S.Ct. 808, 814-15, 13 L.Ed.2d 717 (1965); United States v. Texas, 143 U.S. 621, 641-46, 12 S.Ct. 488, 492-94, 36 L.Ed. 285 (1892). Another is a waiver of immunity against suits by other states. South

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(Footnote Continued)
equity."); Alabama v. Pugh, 438 U.S. 782, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978).

Dakota v. North Carolina, 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904).

The plaintiff asserts that this second type of consent removes the Eleventh Amendment as a bar to this action, arguing that the action is in essence one by the United States to which the State is not immune. The plaintiff points out that under the IGRA, the United States Secretary of the Interior may file suit against a State to enforce the mediation process set forth in the IGRA. See 25 U.S.C. §§ 2710(d)(7)(B)(vii) & (A)(iii). From this statutory provision and Moe v. Confederated Salish and Kooetenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), the plaintiff concludes that the partnership between the Tribe and the United States in the judicial dispute resolution process

makes the suit in reality one by the United States in which Alabama has no immunity.

In Moe, the Supreme Court held that a suit by an Indian tribe challenging a Montana statutory scheme for assessment and collection of personal property taxes was not barred by a statute prohibiting district courts from enjoining collection of state taxes. That jurisdictional rule provided that

> "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

Moe, 425 U.S. at 470, 96 S.Ct. at 1640. The Court found that the legislative history to the subsequently enacted 28

U.S.C. § 1362, a statute providing federal courts with general jurisdiction over civil actions brought by Indian tribes, indicated "a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as [the tribe's] trustee, but for whatever reason were not so brought. Id. at 472, 96 S.Ct. at 1640. The Court examined the cause of action at issue and concluded:

> Here the United States could have made the same attack on the State's assertion of taxing power as was in fact made by the tribe. . . . We think that the legislative history of §1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded

> treatment similar to that of the United States had it sued on their behalf.

Id. at 474, 96 S.Ct. at 1641-42 (citations and footnotes omitted).

This Court finds Moe distinguishable on two grounds. First, it was important in Moe that the United States as the tribe's trustee could have brought the same action that the tribe was bringing. In the instant case, the same is not true. Under the IGRA, the Secretary of the Interior may institute a cause of action in Federal District Court to enforce the procedures prescribed under 25 U.S.C. § 2710(d)(7)(B)(vii). 25 U.S.C. 2710(d)(7)(A)(iii) (West Supp. 1991). Subparagraph (b)(vii) requires the Secretary to prescribe procedures to enforce the result of mediation under 25

U.S.C. § 2710(d)(7)(B)(iv). This authorization of suit by the Secretary does not enable him to bring the instant action on behalf of the tribe, but to bring an action which cannot be brought until after the instant action.

The IGRA allows an Indian tribe to sue a state after the expiration of 180 days from the tribe's request for the state to enter into negotiations. 25 U.S.C. § 2710(d)(7)(B)(i) (West Supp. 1991). If the court at that time finds that the state has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the state and the Indian tribe to conclude such a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii) (West Supp. 1991). If the state and the tribe fail

to conclude a compact within the 60-day period, the court then appoints a mediator to select from proposals each submits. 25 U.S.C. § 2710(d)(7)B)(iv) (West Supp. 1991). The mediator's selection becomes the Tribal-State compact if the state consents to it within 60 days. 25 U.S.C. § 2710(d)(7)(B)(vi) (West Supp. 1991). If the state does not consent, then the situation arises where the Secretary of the Interior must prescribe procedures to effectuate the compact selected by the mediator and may bring an action to enforce it. At no point prior to the state's failure to consent to a compact selected by a court-appointed mediator is the Secretary entitled to bring an action on behalf of the Indian tribe. This instant action has not reached a point where the Secretary becomes

involved so that, unlike Moe, the plaintiff Indian tribe is not representing the United States. For that reason, Moe does not require a holding that this action involves Alabama's consent inherent "in the plan of the convention."

Moreover, Moe is distinguishable on another ground. Moe involved clothing an Indian tribe with the litigation privileges of the United States when there was a federal statutory bar to suit. Here, there is no mere statutory bar, but the bar of the Eleventh Amendment to the Federal Constitution. In this context, ~~the~~ plaintiff's theory seems to have been rejected by the United States Supreme Court in Employees of Dept. of Public Health & Welf. v. Missouri, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). In Employees,

the Court held that a state could not be sued by its employees for overtime compensation under the Fair Labor Standards Act. Section 16(c) of the FLSA gave the Secretary of Labor authority to bring such a suit, but the Court did not even suggest that such an arrangement turned the suit by the employees into one "in essence" by the United States. On the contrary, the Court used the fact that the Secretary had authority to enforce the FLSA to bolster its conclusion that Congress did not intend to allow individuals to sue a state. Id. at 285-86, 93 S.Ct. at 284-5.

3. Parden and its Progeny

The plaintiff also finds Alabama's consent to suit under a third theory, that of Parden and its progeny, perhaps more properly viewed as a species of the consent inherent in the plan of the

convention theory. The Tribe argues that the State of Alabama accepted the benefits of the Indian Gaming Regulation Act, federal legislation the Tribe claims clearly conditions participation in the federal program on a waiver of sovereign immunity.

In Parden v. Terminal Railway, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), the Supreme Court held that a State as owner and operator of a railroad may not plead sovereign immunity when it is sued under the Federal Employers' Liability Act. The Court held that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." Id. at 192, 84 U.S. at 1213. Thus, under Parden, when a state chooses

to engage in a business that is regulated by the Federal Government pursuant to the Commerce Clause of the Federal Constitution, that State is deemed to have consented to the federal regulation that comes with the territory-- including lawsuits by private parties. Incidentally, the State of Alabama has not engaged in the gambling business.

Later cases have not read the Parden exception expansively. No Supreme Court decision except Parden itself, which was a five-four decision, has found consent under the Parden theory, and the requirement that Congress' intention to condition a state's participation in federally regulated activities on a forfeiture of sovereign immunity be clearly expressed

has been strengthened so that already part of Parden stands overruled.

In Employees of Dept. of Public Health & Welf. v. Missouri, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), the Supreme Court noted that the state hospitals being sued under the FLSA were non-profit organizations, compared to the railroad business which Alabama operated "for profit" in Parden. Id. at 283, 93 S.Ct. at 1617. The Court put aside "[t]he dramatic circumstances of the Parden case" and found that Congress had not used such language in the FLSA as to clearly condition a state's operation of the hospital facilities at issue on the forfeiture of immunity from suit in a federal forum. Id. at 285, 93 S.Ct. at 1618.

In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court further limited Parden. In Edelman, the Court found the Eleventh Amendment to be a bar to a suit against Illinois for the retroactive payment of AABD benefits wrongfully withheld. The Court rejected the argument that Illinois had constructively consented to the suit by participating in the federal Aid to the Aged, Blind and Disabled program and by agreeing to administer federal and state funds in compliance with federal law. Id. at 673, 94 S.Ct. at 1360. The Court noted that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights," and declared that:

> In deciding whether a State has waived its constitutional

> protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Id. at 673, 94 S.Ct. at 1360-61 (citation omitted).

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), was a case which further tightened the statutory clarity required to find Parden style consent. There, the Court found that California had not consented to suit in federal court by accepting funds under the Rehabilitation Act because the language of the Act did not clearly condition the receipt of funds on a waiver of sovereign immunity. In so doing, the court

recognized that "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." Id. at 246-47, 105 S.Ct. at 3149.

Finally, in 1987, recognizing that "Parden's discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law," the Supreme Court overruled anything in Parden inconsistent with the requirement of "unmistakably clear language. "Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 478, 107 S.Ct. 2941, 2948, 97 L.Ed.2d 389 (1987).

While there is no question that the IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court, the plaintiff's explanation of how Alabama has "consented" to this provision of the

statute falls somewhat short. The Tribe claims that

> Alabama has participated in IGRA by engaging in negotiations to obtain jurisdiction over gaming activities on Indian lands and in so doing has waived any Eleventh Amendment immunity. . . . [T]he State has also unquestionably benefitted from its participation in IGRA because it provides an exception to the rule that states cannot sue tribes or enforce their laws on tribal lands.

[Plaintiff's Brief, Doc. #15, p. 12].

The statutory provision allowing an Indian tribe to sue a state in federal district court, 25 U.S.C. §2710(d)(7)(A)(i), is triggered by a state's failure to negotiate or to conduct such negotiations in good

faith. In other words, the primary way for a state to subject itself to suit under the IGRA is to do nothing. This is a far cry from the "dramatic circumstances of the Parden case," Employees, supra, where the state had entered the railroad business, like every other private company, for monetary profit. Here, Alabama has not engaged in any business, either for-profit or not-for-profit. Neither has Alabama received or administered any federal funds. Moreover, accepting as true the tribe's allegations that the state has negotiated with it to some extent, the fact of negotiations cannot change anything. If simply engaging in negotiations is enough to constitute consent, the state was faced with the Hobson's choice of negotiating and consenting to suit or refusing to

negotiate and being sued for failure to negotiate. The act of negotiating itself seems even less an act of consent in light of the fact that the IGRA purports to compel states to negotiate, for it provides that "[u]pon receiving [a request to negotiate from an Indian tribe] the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. §2710(d)(3)(A) (West Supp. 1991) (emphasis supplied). Such a coercive construction of the statute as the Tribe urges would not be consent to suit but complete abrogation of Eleventh Amendment immunity under the guise of consent. The Court finds that Alabama has not consented to suit under the Parden doctrine.

B. Abrogation

Since 1976, Supreme Court decisions have allowed Congress to abrogate a state's Eleventh Amendment immunity in some circumstances, but the "cases require Congress' exercise of-power to abrogate state sovereign immunity, where it exists, to be exercised with unmistakable clarity." Blatchford v. Native Village of Noatak, --- U.S. ---, ---, 111 S.Ct. 2578, 2584 (1991) (emphasis supplied). While neither 28 U.S.C. §1331 nor 28 U.S.C. §1362 could abrogate a state's immunity, this Court has little doubt but that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation. The applicable provision of the IGRA provides:

> The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.

25 U.S.C. §2710(d)(7)(A)(i) (West Supp. 1991). It is difficult to imagine a clearer statement of Congress' intent to subject states to lawsuits in the federal courts. However, whether Congress has the power to do this, no matter how clear it makes its intentions, is another question entirely. Because this Court believes that Congress does not have the power to abrogate a state's Eleventh Amendment

immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause, this Court finds that there could not constitutionally have been and therefore was not any abrogation of the states' Eleventh Amendment immunity in the enactment of the Indian Gaming Regulation Act.

1. Pennsylvania v. Union Gas Co.

The plaintiff primarily relies on Pennsylvania v. Union Gas Co., --- U. S. ---, 109 S.Ct. 2273 (1989), a sharply divided Supreme Court decision, for the proposition that Congress had the authority to abrogate Alabama's Eleventh Amendment immunity when it enacted the IGRA. In the Union Gas plurality opinion, written by then Justice Brennan, four members of the Court concluded that Congress has the authority to override States' immunity

when legislating pursuant to the Interstate Commerce Clause. Union Gas, 109 S.Ct. at 2284. In Part III of its opinion the plurality reasoned from language in Parden and Employees that "the power to regulate commerce includes the power to override States' immunity from suit. . . Id. at 2281.

The deciding vote on the constitutional issue was cast by Justice White who, unfortunately, was somewhat less than clear about exactly what his concurrence meant. Justice White spent over five pages of the Supreme Court Reporter explaining in partial dissent why he did not believe the statute at issue clearly expressed a Congressional intent to abrogate the state's immunity, a position joined by three other justices. Then, in part II of his concurrence, he devoted one short

paragraph to the constitutional issue, saying only that "I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." Id. at 2295.[2]

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[2]For a similarly perplexed view of the import of Justice White's concurrence, see Hart and Wechsler's The Federal Courts and The Federal System, (3d ed. 1988), 1989 Supp. at 94: "Doesn't a Justice who casts the deciding vote have some obligation to provide an explanation that is intelligible to the legal community?"

Justice Scalia cast the deciding vote on the statutory construction issue, agreeing with Brennan's plurality opinion that the Congressional language at issue was sufficiently clear to override a state's Eleventh Amendment immunity assuming the authority to do so. Id. However, joined by three other justices, he dissented as to Congress' authority to abrogate when legislating pursuant to the Commerce Clause, lamenting that "instead of cleaning up the muddled Eleventh Amendment jurisprudence produced by Hans, the Court leaves that in place, and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers." Id. at 2303.

Because Union Gas is not directly on point, and with an eye toward the

shaky ground on which it stands, this Court does not find the decision to be controlling. The weakness of the plurality opinion lends this Court to believe that it should not be given an expansive application and that, read narrowly, it does not require a determination that Congress had the power to abrogate Alabama's Eleventh Amendment immunity when it enacted the Indian Gaming Regulation Act.

To begin with, Justice White's mysterious, laconic concurrence on the abrogation issue makes the plurality opinion something of a "four-and-a-half" vote majority. Moreover, two of the justices who joined the plurality opinion, Justice Marshall and Justice Brennan, are no longer members of the Supreme Court. While this fact does not in itself change the fact that the

decision is presently on the books, Justice Scalia's four-vote dissent on the abrogation issue pointed out that the holding in Union Gas is "unstable" and the principle on which it rests "too much at war with itself to endure." 109 S.Ct. at 2273. Accordingly, this Court does not believe that the Union Gas decision should be given an expansive application until further guidance from the Supreme Court regarding exactly what the decision means and where it is leading.

With this understanding of Union Gas, it is clear that applying it to this case would be an unwarrantably expansive application. While Union Gas involved Congress' power to abrogate a state's Eleventh Amendment immunity when legislating pursuant to the Interstate Commerce Clause, the attempted

abrogation at issue here was enacted pursuant to Congress' power under the Indian Commerce Clause. As the Supreme Court declared during the same term it decided Union Gas, "It is well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." Cotton Petroleum Corp. v. New Mexico, -- U.S. --, ---, 109 S.Ct. 1698, 1716 (1989). As the Court elaborated, "[t]he extensive case law that has developed under the Interstate Commerce Clause [] is premised on a structural understanding of the unique role of the states in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." Id. This Court does not feel warranted in extending Union Gas's holding that Congress may abrogate a state's Eleventh

Amendment immunity when legislating pursuant to the Interstate Commerce Clause to the Indian Commerce Clause. See also Mississippi Band of Choctaw Indians, No. J90-0386(B), slip op. at 13 (S.D.Miss. April 9, 1991) (concluding that Union Gas is not controlling authority for the determination of the Eleventh Amendment issues surrounding the IGRA). Accordingly, Union Gas does not require a determination that Congress had the power to abrogate Alabama's Eleventh Amendment immunity when it enacted the Indian Gaming Regulation Act. Moreover, it is difficult for the Court to imagine how the Indian Commerce Clause, a provision of Article I of the Constitution, could restrict the operation of the Eleventh Amendment, since the Eleventh Amendment was adopted subsequent to and for the

purpose of amending the original Constitution.

2. Peel v. Florida Dept. of Transp.

The plaintiff also relies on Peel v. Florida Dept. of Transp., 600 F.2d 1070 (5th Cir. 1979).[3] In Peel, the former Fifth Circuit allowed a Florida state employee to assert his federal reemployment rights against the state when his employment was terminated after he missed work on account of reserve military duty. The court reasoned that

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[3]The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

since the provision of the Veterans' Reemployment Rights Act which authorized suit against the state was within the legitimate scope of Congress' war power, the employee's suit to enforce rights granted by the Act was not barred by the Eleventh Amendment. After a careful survey of the nascent caselaw on Congressional abrogation of a state's Eleventh Amendment immunity, the panel summarily declared:

> We are well aware that Fitzpatrick and Hutto involved the power of Congress under section 5 of the fourteenth amendment wherein: the Act challenged here is founded on Congress's war power under article I. However, we are persuaded that nothing in the history of the eleventh amendment, the doctrine of sovereign immunity, or the case law

indicates that Congress, when acting under an article I, section 8 delegated power, lacks authority to provide for federal court enforcement of private damage actions against the states.

Peel, 600 F.2d at 1080 (footnote omitted). Relying on this statement of its understanding of the law, the Court decided that Congress has the power to abrogate a state's Eleventh Amendment immunity when legislating pursuant to its war power. This Court can readily understand how the Fourteenth Amendment can limit the operation of the Eleventh Amendment, as the Fourteenth Amendment was adopted subsequent to the Eleventh Amendment, but fails to understand how the Peel court made the leap to the conclusion that an Article I power of Congress can limit the Eleventh

Amendment when the Eleventh Amendment was adopted for the purpose of restricting the powers granted to the Federal Government under the original Constitution and not the other way around.

The plaintiff relies heavily on the quoted language from Peel. However, it must be acknowledged at the outset that anything in Peel beyond Congress' power to abrogate under the War Power clause is mere dicta, for that case involved a statute enacted under Congress' war power. Moreover, it is readily apparent that the war power is different from Congress' power under the Indian Commerce Clause and that the special nature of the war power was important to the panel deciding Peel. The Peel court called the war power "one of the central powers given by the states to the

federal government" and acknowledged that "'[t]he war power of the federal government is its supreme power. When it is in action it is transcendent.'" Peel, 600 F.2d at 1081 (quoting St. Johns River Shipbuilding Co. v. Adams, 164 F.2d 1012, 1015 (5th Cir. 1947)).[4]

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[4]While it may seem disingenuous to contend that the Indian Commerce Clause is substantially different from the War Powers Clause, given that the Peel court saw itself as extending abrogation from the Commerce Clause to the War Powers Clause (600 F.2d at 1081), later pronouncements from the Supreme Court demonstrate that the Peel court misapprehended the cases it relied upon. See below.

The Indian Commerce Clause, while it does provide Congress with plenary power to legislate in the field of Indian affairs, Cotton Petroleum, supra, 109 S.Ct. at 1716, is not "transcendent" in the sense that the War Power is.

Therefore, this Court does not consider Peel to be controlling on the issue of whether Congress may abrogate a state's Eleventh Amendment Immunity when legislating pursuant to the Indian Commerce Clause. Moreover, this Court questions whether Peel is still good law in light of later pronouncements from the United States Supreme Court. While the Peel court did an admirable job of grappling with the caselaw as it existed at the time, the panel would have to have been prophetic to discern the labyrinthine lines along which Eleventh Amendment jurisprudence would develop.

For example, the Peel decision does not clearly distinguish between a consent or waiver theory and an abrogation theory. While this distinction may not have been apparent at the time Peel was decided, Blatchford makes clear that consent/waiver and abrogation are two separate and distinct lines of inquiry. As the Supreme Court stated, "[n]ot until 1976 . . . did we first acknowledge a congressional power to abrogate state immunity--under §5 of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)." Blatchford, supra, 111 S.Ct. at 2585. This confusion of the two doctrines led the Peel court to rely on Parden and Employees in finding that Congress has power to abrogate when legislating pursuant to its Commerce Clause power and to then extend this abrogation power

to the War Power Clause. However, both those cases were decided before Fitzpatrick, the first abrogation case. Therefore, Peel's "extension" of the power to abrogate from the Commerce Clause to the War Power Clause rested on a faulty assumption. While the Supreme Court later found that language in Parden and Employees laid "a firm foundation" for its holding in Union Gas that Congress can abrogate state immunity pursuant to the Interstate Commerce Clause, 111 S.Ct. at 2281, Parden and Employees did not so hold.

In Parden, supra, the Supreme Court held that the State of Alabama, which owned and operated a railroad in interstate commerce, could not successfully plead sovereign immunity in a federal-court suit brought against the railroad by one of its employees under

the Federal Employers' Liability Act. Parden, 377 U.S. at 184, 84 S.Ct. at 1208, 1209. The theory was not abrogation but consent. In Blatchford, the Supreme Court explained Parden and emphatically rejected the notion that it was an abrogation case:

> Parden itself neither mentioned nor was premised upon abrogation. Its theory was that, by entering a field of economic activity that is federally regulated, the State impliedly "consent(s)" to be bound by that regulation and to be subject to suit in federal court on the same terms as other regulated parties, thus "waiv[ing]" its Eleventh Amendment immunity. 377 U.S., at 186, 84 S.Ct., at 1210.

Blatchford, 111 S.Ct. at 2585. The Parden Court itself indicated that

abrogation, a doctrine not yet in existence, was not at issue:

> Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine . . . is here being overridden. It remains the law that a state may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act.

Parden, 377 U.S. at 192, 84 S.Ct. at 1213; see also Employees, 411 U.S. at 282, 93 S.Ct. at 1617 ("The Parden case in final analysis turned on the question of waiver. . . ").

Likewise, Employees, supra, decided three years before the first abrogation case, rested on a consent theory and not on an abrogation theory. In Employees, the Court held that the statutory language of the Fair Labor Standards Act did not clearly indicate a purpose by Congress to make it possible for a State to be sued in federal court. Thus, assuming for the sake of argument that the Court did have an abrogation theory in mind, it did not reach the constitutional question of whether Congress has the power to abrogate a state's Eleventh Amendment immunity when legislating under the Commerce Clause because it concluded that Congress did not even attempt to do so. Moreover, from the Court's language, it is clear that it was employing a consent analysis. In discussing whether

Congress intended to allow employees of state-run hospitals to sue their sovereign employers under the FLSA, the Court stated:

> It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

Employees, 411 U.S. at 285, 93 S.Ct. at 1618 (emphasis supplied). Thus, it is apparent from the Court's language that

it had in mind the Parden consent theory, not abrogation.

Finally, it is striking to note that in the twelve years since it was decided, Peel has never once been cited as authority or even referred to by the United States Court of Appeals for the Eleventh Circuit. This silence as to Peel, while not an express disavowal, must nevertheless be seen as important given the fact that the Eleventh Circuit has several times addressed abrogation. In Carr v. City of Florence, Ala., 916 F.2d 1521 (11th Cir. 1990), reh'g denied, 925 F.2d 1477 (11th Cir. 1991), for example, the Eleventh Circuit recently outlined the two major exceptions to a state's Eleventh Amendment immunity as follows:

> First, Congress can abrogate eleventh amendment immunity without

> the state's consent when it acts pursuant to the enforcement provisions of section 5 of the fourteenth amendment. Atascadero State Hospital v. Scanlon, 473 U. S. 234, 238, 105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). Second, a state may waive its immunity expressly through legislative enactment.

916 F.2d at 1524. See also Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989) (Tjoflat, C.J.), reh'g denied, 871 F.2d 122 (11th Cir. 1989). While neither of these cases was addressing abrogation under the Article I powers of Congress, their failure even to acknowledge Peel in a context providing an opportunity to do so makes its vitality questionable.

3. The Plaintiff's "Plenary Power" Argument

The plaintiff also argues that, even without Union Gas or Peel, Fitzpatrick requires a holding that Congress has abrogation power when acting under the Indian Commerce Clause because that clause gives it plenary power. According to the plaintiff, any constitutional grant of plenary power to Congress carries with it the power to abrogate states' sovereign immunity.

The Court does not believe that the plaintiff's argument represents a proper understanding of Fitzpatrick. The plenitude of Congress' Fourteenth Amendment power was not the primary factor driving the Supreme Court's landmark decision in Fitzpatrick that Congress has the power to abrogate a state's Eleventh Amendment immunity when it is legislating pursuant to §5 of the

Fourteenth Amendment. As the Court stated,

> When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick, 427 U.S. at 456, 96 S.Ct. at 2671. The Court also made clear that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, ... are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." Id. (citation omitted). Thus it was the impact of the Fourteenth Amendment upon the

relationship between the federal government and the states and the recognition that it altered the provisions of the previously enacted Eleventh Amendment that drove the Court's decision in Fitzpatrick, not merely the fact that Congress' Fourteenth Amendment power is aptly described as "plenary." While Congress' power under both the Interstate and the Indian Commerce Clauses is also plenary, the Commerce Clause's own terms do not embody the same limitations on state authority found in the Fourteenth Amendment. Accordingly, under Fitzpatrick, only "in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment [may Congress] provide for private suits against States or state officials which are

constitutionally impermissible in other contexts." Id. The Court must therefore reject the plaintiff's plenary power argument.

C. The Ex Parte Young Doctrine

The Supreme Court, in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), explained the Ex Parte Young doctrine in some detail:

> The Court has recognized an important exception to [the] general rule [of sovereign immunity]: **a suit challenging the constitutionality of a state official's action is not one against the state.** This was the holding in Ex parte Young, 28 S.Ct. 441 (1908), in which a federal court enjoined the Attorney General of the State of Minnesota from

bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of this injunction. The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." 28 S.Ct. at 454. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." Id.

While the rule permitting suits alleging conduct contrary to "the supreme authority of the

United States" has survived, the theory of Young has not been provided an expansive interpretation. Thus, in Edelman v. Jordan, 94 S.Ct. 1347 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. ... In particular, Edelman held that **when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief.** Under the theory of Young, such a suit would not be one against the State since the federal-law allegation would strip the state officer of

> his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.

Id. at 102-03, 104 S.Ct. at 909 (citations omitted, boldface added).

While the Ex Parte Young doctrine perhaps allows this suit against the Governor, who has not filed a motion to dismiss, the doctrine clearly does nothing to allow the suit against the State of Alabama for its only application is in official-capacity suits against state officials. See Pennhurst, supra, at 100, 104 S.Ct. at 908 ("It is clear, of course, that in the absence of consent a suit in which the state or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."); Kentucky v. Graham, 473 U.S. 159, 167 n.

2, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985) ("A State cannot be sued directly in its own name regardless of the relief sought").

Because none of the three exceptions to the Eleventh Amendment bar apply to this case, the defendant State of Alabama is entitled to be dismissed from this action.

IV. THE GOVERNOR'S MOTION TO STRIKE

The Governor, while not joining the State' s Motion to Dismiss, has filed a Motion to Strike [Doc. #4], asserting that:

> Any and all allegations contained in the complaint which concern the good or bad faith of either the State of Alabama, Governor Hunt or the plaintiff in conducting negotiations under the Act are irrelevant and immaterial to the

issue set forth above and should be stricken from the complaint; Governor Hunt hereby moves that the Court strike such allegations.

[Governor's Answer, Doc. #4, p.2]. The issue referred to was the subject of the original complaint regarding which forms of Class III gaming must be authorized. In light of the Court's decision, hereinafter set forth, to allow the plaintiff to amend its complaint to more closely track the provisions of the IGRA, the Court is of the opinion that the good or bad faith of the parties may become relevant and material and that the Governor's Motion to Strike is due to be DENIED.

V. THE TRIBE'S MOTION TO AMEND COMPLAINT

The plaintiff filed a 'Motion to Amend Complaint" [Doc. #12], seeking

permission from the Court to alter the relief requested in the original complaint. The Federal Rules of Civil Procedure governing the amendment of pleadings state:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed.R.Civ.P. 15(a). Because the defendants have already answered and have not consented in writing to the amendment, the plaintiff requires the Court's leave to amend. The determination of whether to grant leave

to amend the complaint after responsive pleadings have been filed is within the sound discretion of this Court. Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 406 (11th Cir. 1989). The rules of civil procedure restrict this discretion, however, by directing that leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); Shipner, 868 F.2d at 407. Thus, in the absence of any apparent reason not to do so, the Court should grant leave to amend. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); Shipner, 868 F.2d at 407.

There being no response from the Governor and no apparent reason not to grant leave to amend, it is hereby ORDERED that the plaintiff's Motion to Amend Complaint [Doc. #12] is GRANTED.

VI. CONCLUSION

For the foregoing reasons, the defendant State of Alabama's Motion to Dismiss [Doc. #6] is GRANTED, the defendant Guy Hunt's Motion to Strike [Doc. #4] is DENIED, and the plaintiff's Motion to Amend Complaint [Doc. #12] is GRANTED.

DONE this 30th day of October, 1991.

s/ Alex T. Howard

CHIEF UNITED STATES DISTRICT JUDGE

U.S. District Court
Sou. Dist. Ala.
Filed and entered
this the 30th day
of October, 1991,
Judgment Entry #1067
John V. O'Brien, Clerk
By: B. Turner, Deputy Clerk

Judgment Entered
On Docket
Date: 11-1-91,R.H.
John V. O'Brien,
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

POARCH BAND OF CREEK INDIANS	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
STATE OF ALABAMA and GUY HUNT, Governor of the STATE OF ALABAMA,	)	NO. 91-0757
Defendants.	)	

ORDER

This matter is before the Court on the "Motion to Dismiss" [Doc. #24] filed by the defendant Guy Hunt, Governor of the State of Alabama (the "Governor"), and on the "Motion to Amend Complaint" [Doc. #33] subsequently filed by the plaintiff Poarch Band of Creek Indians

(the "Tribe") on December 10. The State of Alabama (the "State") responded to the latter with its "Motion to Dismiss or, in the Alternative, Motion to Strike the State from the Second Amended Complaint or, in the Alternative, Objection to Motion to Amend" [Doc. #37] on December 20.

This action began with the filing of a Complaint by the Tribe on September 11, 1991, seeking redress for alleged violations of the Indian Gaming Regulation Act, 25 U.S.C. § 2701 et seq ("IGRA"). [Doc. #1] The State responded by filing a Motion to Dismiss based on the Eleventh Amendment to the Federal Constitution [Doc. #6], which the Court granted on October 30, 1991. [Doc. #22]; See 776 F.Supp. 550 (S.D.Ala. 1991). The Court hereby

adopts and incorporates all of its previous order.

I. THE TRIBE'S MOTION TO AMEND COMPLAINT

The Tribe's Motion to Amend Complaint [Doc. #33] seeks to add to its Complaint a cause of action under the Fourteenth Amendment and 42 U.S.C. § 1983 arising from the Governor's alleged violation of the Indian Gaming Regulation Act and from the alleged deprivation of the Tribe's property and liberty interest without due process of law.

The Federal Rules of Civil Procedure governing the amendment of pleadings states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the

> party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed.R.Civ.P. 15(a). Because the defendants have already answered and have not consented in writing to the amendment, the plaintiff requires the Court's leave to amend. The determination of whether to grant leave to amend the Complaint after responsive pleadings have been filed is within the sound discretion of this Court. Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 406 (11th Cir. 1989). The rules of civil procedure restrict this discretion, however, by directing that leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a); Shipner, 868 F.2d at 407. Thus,

in the absence of any apparent reason not to do so, the Court should grant leave to amend. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); Shipner, 868 F.2d at 407.

At the Rule 16 Conference on December 16, 1991, the Governor's attorney advised the Court that the Governor would oppose the Tribe's Motion to Amend Complaint. However, no such opposition has been received by this Court from the Governor. Furthermore, while the State has filed a pleading styled alternatively as an "Objection to Motion to Amend" [Doc. #37], neither the pleading nor its accompanying brief [Doc. #38] addresses the Tribe's Motion to Amend. Rather, the State's brief challenges the Court's jurisdiction over the complaint against the State as it

would appear after an order granting the Tribe's Motion to Amend, and the State's arguments on this matter will be addressed in Part II below.

Therefore, in the absence of any opposition from the Governor or the State, the Tribe's Motion to Amend Complaint [Doc. 33] is **GRANTED.**

II. THE STATE'S MOTION TO DISMISS OR STRIKE

The State of Alabama was dismissed from this action because of this Court's lack of subject matter jurisdiction on October 30, 1991 [Doc. #22]. Because the plaintiff's amended complaint does not state any new jurisdictional ground for suit against the State other than 42 U.S.C. § 1983, this action may not be maintained against the State of Alabama unless § 1983 allows it. However, the Supreme Court has unequivocally held

that a State is not a "person" within the meaning of § 1983, Will v. Michigan Dept. of State Police, --- U.S. ---, ---, 109 S.Ct. 2304, 2308 (1989), and therefore § 1983 provides the Tribe with no cause of action against the State of Alabama. Accordingly, the State of Alabama's prematurely filed Motion to Dismiss [Doc. #37] is deemed to be refiled on the Second Amended Complaint in light of the Court's granting the Tribe's Motion to Amend and is **GRANTED**, and the State's alternative motions contained in the same pleading are **MOOT**.

III. **THE GOVERNOR'S MOTION TO DISMISS**

Shortly after the Court granted the State's Motion to Dismiss, the Governor responded by filing his own Motion to Dismiss. Both the Governor and the Tribe filed briefs on the motion and this Court held a hearing on the matter

on December 5, 1991, five days before the plaintiff filed its Motion to Amend Complaint. On January 6, 1992, the Tribe filed a "Motion for Ruling on Motion to Amend" [Doc. #39], requesting that the Court issue a ruling on the Tribe's Motion to Amend and set forth specific deadlines for the filing of additional briefs regarding the motions to dismiss pending before the Court. In view of the lateness of the filing of the Tribe's Motion to Amend, the Court is deeming the Governor's Motion to Dismiss to be refiled in light of the Second Amended Complaint. The Tribe's request that a briefing schedule be set up indicates no opposition from the Tribe to the Court's deeming the Governor's Motion to Dismiss to be refiled in light of the Second Amended Complaint.

Accordingly, the Governor is **ORDERED** to file a brief within eleven (11) days from the date of this Order addressing whether the Tribe's Second Amended Complaint, alleging a § 1983 action against the Governor in his official capacity, is due to be dismissed for lack of subject matter jurisdiction. The Tribe is **ORDERED** to respond to such brief within twenty-two (22) days from the date of this Order, at which time the Court will take the matter under submission.

DONE this 24th day of January, 1992.

s/ Alex T. Howard

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

POARCH BAND OF CREEK INDIANS	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION
STATE OF ALABAMA and GUY HUNT, Governor of the State of Alabama,	)	NO. 91-0757
Defendants.	)	

ORDER

This matter is before the Court on the "Motion to Dismiss" [Doc. #24] filed by the defendant Guy Hunt, Governor of the State of Alabama (the "Governor"). Because the Court finds that its assertion of jurisdiction over the Governor in this case would violate the

Eleventh Amendment, the Governor's Motion to Dismiss is GRANTED.

I. PROCEDURAL HISTORY OF CASE

This action began with the filing of a Complaint by the Poarch Band of Creek Indians (the "Tribe") on September 11, 1991, seeking declaratory and injunctive relief as redress for alleged violations of the Indian Gaming Regulation Act, 25 U.S.C. § 2701 et seq. ("IGRA") [Doc. #1] The State responded by filing a Motion to Dismiss based on the Eleventh Amendment to the Federal Constitution [Doc. #6], which the Court granted on October 30, 1991. [Doc. #22]; See 776 F.Supp. 550 (S.D.Ala. 1991). The Court hereby adopts and incorporates all of its previous order.

Shortly after the Court granted the State's Motion to Dismiss, the Governor responded by filing his own Motion to

Dismiss. Both the Governor and the Tribe filed briefs on the motion and this Court held a hearing on the matter on December 5. Five days later the plaintiff filed a Motion to Amend its Complaint to state a cause of action under 42 U.S.C. § 1983, which the Court granted on January 24, 1992. Because of the lateness of the amendment, the Court deemed the Governor's Motion to Dismiss to be refiled in light of the Second Amended Complaint and requested the parties to brief any issues implicated by the amendment which had not been already addressed by the briefs and oral argument in connection with the Motion to Dismiss the First Amended Complaint. The parties have now done so.

II. JURISDICTION UNDER THE IGRA

Having already ruled that Congress could not constitutionally abrogate the State of Alabama's sovereign immunity under the IGRA, and that the State of Alabama did not consent to this suit, these rulings are equally applicable with respect to its official agent, the Governor. However, the Tribe urges that this suit may be maintained under the IGRA against the Governor in his official capacity under the Ex parte Young doctrine.

In Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the United States Supreme Court held that a Federal District Court could enjoin the Minnesota Attorney General's enforcement of an unconstitutional railroad rate-setting statute which criminalized violations and called for punishment

through fines and imprisonment. As the Supreme Court stated:

> [I]ndividuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U. S. at 155-56, 28 S. Ct. at 452. The theory behind the Court's decision was that a state officer attempting to enforce an unconstitutional statute does not actually act on behalf of the state. As the Court explained:

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159-60, 28 S.Ct. at 454.

Young's progeny have interpreted the case to mean that a suit against a state officer seeking prospectively to enjoin his compliance with federal law

is deemed not to be a suit against the state and therefore not prohibited by the Eleventh Amendment.[1] However, it is

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[1] See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (Court could issue injunction against state official to prospectively enjoin him from failing to process Aid to the Aged, Blind or Disabled applications within the time limits established by federal regulations, but could not award retroactive benefits which had been wrongfully withheld); Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Court could require state officials to send each member of the plaintiff class an informational notice

(Footnote Continued)

not true that any suit against a state

(Footnote Continued)
ancillary to prospective relief already ordered in Edelman); Milliken v. Bradley, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) ("Milliken II") (Court could order comprehensive remedial program in desegregation context, the costs to be borne in part by the State); Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (Court could award attorney's fees against a state officer, to be paid from state funds, for his bad faith refusal to comply with its order to remedy constitutional violations at state prison); Cory v. White, 457 U.S. 85, 102 S.Ct. 2309, 72 L.Ed.2d 694

(Footnote Continued)

officer seeking prospective equitable

(Footnote Continued)
(1982) (Interpleader action against two states attempting to tax estate was prohibited suit against states themselves where the state officers' actions were not contrary to federal or state law); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ("Pennhurst II") (Young and Edelman inapplicable when the state official is alleged to be violating state rather than federal law); Papasan v. Allain, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (Denying retroactive relief against state for federal school lands grants trust money that has been lost,

(Footnote Continued)

relief escapes the Eleventh Amendment bar, and two separate limitations on the doctrine apply to the Court's assertion of jurisdiction over the Governor based on the IGRA in this case. The first is that a suit seeking to compel a state officer to perform a discretionary act may not be maintained. The second is that a suit naming as the defendant a state officer which is in reality a suit against the State is barred by the Eleventh Amendment no less than if it had been brought against the State itself.

(Footnote Continued)
but allowing relief for an Equal Protection Clause violation with respect to the distribution of school funds).

A. DISCRETIONARY vs. MINISTERIAL ACT

An important limitation on the Young doctrine announced in Young itself is that a federal court may not "control the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." Ex parte Young, 209 U.S. at 158, 28 S.Ct. at 453. No case cited by either party to this action or discovered by the Court involves a federal court ordering a state officer

to exercise his discretion outside of the Fourteenth Amendment context.[2]

For this Court to order the Governor and the Tribe to conclude a Tribal-State compact, as provided by 25 U.S.C. § 2710(d)(7)(B)(iii) (West Supp. 1991), would clearly be to order the Governor to exercise discretion. Negotiating with the plaintiffs to institute state policy is by no means ministerial and involves discretion in

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[2] See, e.g., Milliken II, supra at n. 1; Brown v. Georgia Dept. of Revenue, 881 F.2d 1018 (11th Cir. 1989) (Members of State Personnel Board ordered to hold a termination hearing to afford terminated employee his procedural due process rights).

ways not contemplated by a court order directing a party to refrain from instituting a prosecution under an unconstitutional statute as in Young, to comply with federal time limits in processing AABD applications as in Edelman, to mail a notice provided by the court as in Quern, or to pay attorney's fees as in Hutto. Accordingly, this Court is without jurisdiction to order the Governor to negotiate with the plaintiff Tribe or to conclude a Compact as contemplated by the Indian Gaming Regulation Act.[3]

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[3]Although not strictly relevant to the jurisdictional issue, apparently the Tribe is seeking to require the

(Footnote Continued)

B. STATE AS REAL PARTY IN INTEREST

Moreover, this Court believes that this suit against the Governor is in reality a suit against the State of Alabama. Simply seeking injunctive relief against a state officer does not remove the Eleventh Amendment bar if the State is the real party in interest, for "Edelman did not hold [] that the Eleventh Amendment never applies unless a judgement for money payable from the state treasury is sought." Cory v.

(Footnote Continued)
Governor, not only to negotiate with the Tribe with respect to gaming activities such as casino gambling, but to compel the Governor to allow gaming activities on tribal land which are not otherwise permitted in the State of Alabama.

White, 457 U.S. at 90, 102 S.Ct. at 2328. As the Supreme Court explained in Pennhurst II.

> "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed.2d 191 (1963) (per curiam). And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against the State is barred regardless of whether it seeks damages or injunctive relief. See Cory v. White, 457 U.S. 85, 91, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982).

Pennhurst II, 465 U.S. at 101-102, 104 S.Ct. at 908-909 (footnote omitted).

Quoting from Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (citations omitted), the Pennhurst II court explained that "'a suit is against the sovereign if "the judgement sought would expand itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgement would be "to restrain the Government from acting, or to compel it to act."'" Id. at 101 n. 11, 104 S.Ct. at 908. The Tribe's complaint, consonant with the IGRA's directive that "the State shall negotiate with the Indian tribe in good faith to enter into [] a compact," 25 U.S.C. § 2710(d)(3)(A) (West Supp. 1991) (emphasis supplied), seeks to have the Governor negotiate with it to reach a Tribal-State compact on behalf of the State. Thus, a decree

ordering the Governor to negotiate would operate against the sovereign rather than against the state officer, for it is the State itself that would be enjoined by the order because the State itself would be the entity entering into any compact the Governor negotiates. If this Court issued an order that the Governor negotiate a compact with the Tribe, it would interfere with the State's public administration and compel the State to act. Such an order this Court has no jurisdiction to issue.

III. JURISDICTION UNDER § 1983

In an eleventh-hour attempt to avoid the Eleventh Amendment bar, the Tribe has amended its Complaint in an effort to state a cause of action under 42 U.S.C. § 1983. The Tribe's Second Amended Complaint alleges:

> The Governor's failure to conclude a compact with the Tribe constitutes a violation of IGRA redressable under 42 U.S.C. § 1983, a violation of the Fourteenth Amendment by depriving the Tribe and its members of property and liberty interest[s] without due process of law, and a violation of the provisions of the Supremacy Clause of the United States Constitution.

[Second Amended Complaint, Doc. #47, para. 29].

The Tribe's assertion of jurisdiction through its § 1983 cause of action is unavailing to rescue this action from the bar imposed by the Eleventh Amendment. In effect, the Tribe is attempting to sue the Governor in his official capacity under § 1983 to

secure the State's compliance with the Indian Gaming Regulation Act through him as its agent.

As the Supreme Court has recently pointed out in another context,

> official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" ... A suit against a state officer in [his] official capacity therefore should be treated as a suit against the State ... [and] the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses.

Hafer v. Melo, --- U.S. ---, ---, 112 S.Ct. 358, 361-62 (1991) (citations omitted); see also Free v. Granger, 887

F.2d 1552, 1557 (11th Cir. 1989) (§ 1983 "[s]uits against [state] officials in their official capacities are effectively suits against the entity that those officials represent.") Because the Governor has available to him the same Eleventh Amendment immunity as the State, the Tribe may sue him in his official capacity under § 1983 only if his state immunity fails in some fashion. Section 1983 itself works no abrogation of Eleventh Amendment immunity, Quern v. Jordan, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 39 L.Ed.2d 358 (1979), and this Court has already ruled that the IGRA did not abrogate state immunity or involve a state waiver of immunity. Therefore, the only ground left for the Tribe's use in defeating the Eleventh Amendment bar against its § 1983 cause of action is

the Ex parte Young doctrine. However, the Young exception to the Eleventh Amendment bar fails in the § 1983 context of this case for one of the same reasons that it fails in the IGRA context: This suit against the Governor is in reality a suit against the State of Alabama.[4] For that reason, the

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[4]Assuming without deciding that the Tribe is correct in asserting that the Fourteenth Amendment has been violated in this case, there appears to be some difficulty in applying the discretionary vs. ministerial act dichotomy to the Tribe's § 1983 claim. However, the Court's decision that the suit against the Governor is in fact

(Footnote Continued)

existence of a cause of action under 42 U.S.C. § 1983 does not confer on this Court jurisdiction to hear this action.

IV. CONCLUSION

For the foregoing reasons, the Governor's Motion to Dismiss [Doc. #24] is **GRANTED**.

(Footnote Continued)
one against the State is a separate and independently adequate ground for finding want of jurisdiction under both the IGRA and § 1983.

DONE this 20th day of February, 1992.

s/ Alex T. Howard

CHIEF UNITED STATES DISTRICT JUDGE

U.S. District Court

Sou. Dist. Ala.

Filed and entered this the

20th day of February, 1992,

Judgment Entry #1251

John V. O'Brien, Clerk

By: B. Turner, Deputy Clerk

APPENDIX E

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number of Case and Names of Parties

April 6, 1994

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 92-6244 Poarch Creek Indians
v. State of AL

DC DKT NO.: 91-00757 CA-AH-M

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule

41-1 for information regarding issuance and stay of mandate.

Sincerely,

s/ Miguel J. Cortez

MIGUEL J. CORTEZ, Clerk

Reply to: Wardell Lovelace

(404) 331-6147

This letter also applies to consolidated case no. 92-4652.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6244

POARCH CREEK INDIANS, Poarch Band of Creek Indians,

Plaintiff-Appellant,

versus

STATE OF ALABAMA; JAMES E. FOLSOM, JR., Governor of the State of Alabama,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5),

the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Gerald B. Tjoflat

CHIEF JUDGE

Filed: U. S. Court of Appeals
Eleventh Circuit
April 6, 1994
Miguel J. Cortez, Clerk

APPENDIX F

United States Court of Appeals

Eleventh Circuit

56 Forsyth Street, N.W.

Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number of Case and Names of Parties

April 28, 1994

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 92-6244 Poarch Creek Indians
v. State of AL

DC DKT NO.: 91-00757 CA-AH-M

MANDATE STAYED TO AND INCLUDING July 5, 1994

The court has this day granted a stay of the mandate to the date shown above. If

during the period of the stay there is filed in this court a Notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue forthwith. See Fed.R.App.P.41.

The Clerk of the Supreme Court has requested the clerks of the federal courts of appeal to retain the record on appeal until the Supreme Court requests that it be transmitted. Parties will be advised when this occurs. Accordingly, please refrain from routinely requesting

transmittal of the record. See Supreme Court Rule 19.1.

A copy of this court's opinion (or Rule 36-1 decision), the judgment, and any order on rehearing should be attached as an appendix to any petition for writ of certiorari (or jurisdictional statement) filed. See Supreme Court Rules 21(k), 15(j).

Sincerely,

s/ Miguel J. Cortez

MIGUEL J. CORTEZ, Clerk

Reply to: Wardell Lovelace

(404) 331-6147

This letter also applies to consolidated case no. 92-4652.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-4652

SEMINOLE TRIBE OF FLORIDA,

Plaintiff-Appellee,

versus

STATE OF FLORIDA; LAWTON CHILES,
Governor of the State of Florida,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ORDER:

Appellee's motion to stay issuance of the mandate pending petition for writ of certiorari is granted.

s/ Gerald B. Tjoflat

CHIEF JUDGE

Filed: U.S. Court of Appeals

Eleventh Circuit

April 28, 1994

Miguel J. Cortez, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-6244

POARCH CREEK INDIANS, Poarch Band of Creek Indians,

Plaintiff-Appellant,

versus

STATE OF ALABAMA; JAMES E. FOLSOM, JR., Governor of the State of Alabama,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Alabama

---

ORDER:

Appellees' motion to stay issuance of the mandate pending petition for writ of certiorari is granted.

s/ Gerald B. Tjoflat

CHIEF JUDGE

Filed: U.S. Court of Appeals
Eleventh Circuit
April 28, 1994
Miguel J. Cortez, Clerk

APPENDIX G

The following provisions of the Indian Gaming Regulatory Act are directly relevant to this petition:

25 U.S.C. § 2703:

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

25 U.S.C. § 2710:

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian

tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing

body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or

resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution

described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts

comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III

activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into

under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) an Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagrap (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period. In determining in such an action whether

a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator

appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and

a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to

the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

APPENDIX H

Article III, Section 2, Constitution of the United States:

The judicial power shall extend to **all cases, in law and equity,** arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; -- to controversies between two or more states; -- between a state and citizens of another state; -- between citizens of different states; -- between citizens of the same state claiming lands under grants of different states, and between a state or the

citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make. . . .

94-35

No. _____

Supreme Court, U.S.
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JUL 5 1994
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In The

Supreme Court of the United States

October Term, 1994

STATE OF ALABAMA, James E. Folsom,
Governor of the State of Alabama,

Petitioners,

v.

POARCH BAND INDIANS, the Poarch Band
of Creek Indians,

Respondents.

**On Petition For Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA ALASKA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Upon dismissal of a suit on Eleventh Amendment grounds, may an Indian tribe directly request the prescription of gambling procedures from the Secretary of Interior?

II. Does Eleventh Amendment immunity invalidate statutory provisions, allowing the courts to fashion new remedies not prescribed by statute?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT I.

UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR..... 4

ARGUMENT II.

ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alaska Airlines, Inc. v. Brock, 480 U.S. 685 (1987) 9

American Federation of Gov. Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) 8

Apache Tribe of Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op. (DC N.M., Dec. 22, 1992) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 9

Cabazon Band of Mission Indians v. California, 480 U.S. 202 (1988) 7

Federal Radio Com. v. General Electric Co., 281 U.S. 464 (1930) 10

Flast v. Cohen, 392 U.S. 83 (1942) 10

Landgraf v. USI Film Products, ___ U.S. ___, 62 U.S.L.W. 4255 (April 26, 1994) 7

Mistretta v. United States, 488 U.S. 361 (1989) 8

Northwest Airlines, Inc. v. Transportation Workers, 451 U.S. 77 (1981) 7

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 8

Poarch Band of Creek Indians v. Alabama, 11th Cir. No. 92-6244 1

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) 10

Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994) 1, 4, 9

TABLE OF AUTHORITIES – Continued

Page

Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D. Cal. 1992) 7

United States v. Sisson, 399 U.S. 267 (1970)..... 10

CONSTITUTIONAL PROVISIONS

U.S. Const., Article III, § 2, clause 1 9

U.S. Const., Eleventh Amendment..... 1, 4, 7, 9, 10

STATUTES

18 U.S.C. § 1166, *et seq*..... 3

25 U.S.C. § 2710(B)(i)-(vi)..... 4, 5, 8

25 U.S.C. § 2701, *et seq*..... 3

25 U.S.C. § 2710(d)(7)..... 6

25 U.S.C. § 2710(d)(7)(A)(i) 4, 5, 8

25 U.S.C. § 2710(d)(7)(B)(vii)..... 4, 5, 8

25 U.S.C. § 2710(d)(7)(B)(vii)(I)..... 5

OTHER AUTHORITIES

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess. 6

INTEREST OF AMICI STATES

Amici States of the Union now face the prospect, as a result of Part V of the decision of the Court of Appeals,[1] that Indian tribes will bypass procedures established by the Congress for the negotiation and completion of tribal-state compacts for serious gambling on Indian lands in those states. While holding principally that the Eleventh Amendment bars suit by an Indian tribe in federal court against an unconsenting state, the Eleventh Circuit added – almost as an afterthought – that the tribe may notify the Secretary of Interior whenever such a suit is dismissed, and the secretary may prescribe gaming. This legal error converts the States' Eleventh Amendment sovereign immunity into a means to subvert the will of Congress and the sovereignty of the states. Moreover, this judicially-created remedy allows the tribes to request that the Secretary prescribe casino gambling, even in states where it is criminally prohibited, on Indian lands, again contrary to the will of Congress and the sovereign states and principles of federalism. Indeed, the tribes and the Secretary may use the *states'* judicial sovereign immunity as a sword to bypass the tribal-state compacting procedures envisioned by Congress and impose as a matter of federal regulation the gambling requested by tribes.

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[1] Case below consolidated under *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), holding principally that Eleventh Amendment is a bar to suit by an Indian tribe in federal court against an unconsenting State (Part IV). The consolidated decision reversed the district court decision in *Seminole Tribe of Florida v. State of Florida*, 11th Cir. No. 92-4652, and affirmed *Poarch Band of Creek Indians v. Alabama*, 11th Cir. No. 92-6244. 11 F.3d at 1029.

Congress provided for such a secretarial remedy only upon the judicial finding of a lack of good faith by a state to negotiate for that gambling which the state must negotiate. However, experience shows that upon a state's good faith refusal to negotiate for that gambling which it criminally prohibits for all purposes, such as blackjack, slot machines or electronic games of chance, tribes have sued states in federal court claiming a lack of good faith, evoking an Eleventh Amendment defense. The legal error of the court leaves states in the untenable position of facing tribal demands for casino gaming that is criminally prohibited in those states, followed by suit in federal court when the states do not negotiate for the criminally-prohibited gaming. By purposefully evoking a defense of sovereign immunity, tribes may *ab initio* bypass altogether the requirement to negotiate a tribal-state compact, leaving states subject to unbridled federal power to impose a scheme that may be entirely contrary to the states' criminal law.

Amici states believe the Court of Appeals legally erred in this case by reading into a federal statute a remedy for tribes that does not exist and which properly could not have been fashioned in the absence of any Congressional direction. Amici states have an acute interest in the proper determination of the questions presented by the Petition for Certiorari.

SUMMARY OF ARGUMENT

States are subject to the provisions of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701, *et seq.*, and 18 U.S.C. § 1166, *et seq.*[2] As provided by IGRA, states must negotiate tribal-state compacts with Indian tribes for class III gambling activities (all significant gambling beyond bingo and non-banked card games), and face suits by tribes in federal court to enforce the negotiating process. The Court of Appeals' final statement in Part V of the opinion that the tribes may notify the Secretary of Interior (and that the Secretary may then act to prescribe procedures for class III gaming) whenever such a suit is dismissed for subject-matter jurisdiction on Eleventh Amendment grounds is not supported by the statute and arrogates to the Secretary powers not delegated to that official by the Congress.

The states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA, as it goes to the heart of the constitutional scheme balancing the powers of the states and the Federal Government. However, the Court's final statement concerning the tribe's remedy and the Secretary powers is inconsistent with the congressional directive and adversely affects the states. As the case before the courts is to be dismissed for subject matter jurisdiction, the court below was not free to engage in an analysis of severability or to fashion a remedy not envisoned by the Congress. For that reason, amici states respectfully urge this Court to reverse and remand the ruling in Part V of the opinion.

---

[2] Amici states Maine, Massachusetts, and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

ARGUMENT

I.

UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR

The Court of Appeals, in Part V of the opinion, incorrectly states that where a state "pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, *pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary may then prescribe regulations governing class III gaming on the tribe's lands.*" *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); italics added. This procedure, however, does not appear in 25 U.S.C. § 2710(d)(7)(B)(vii), as cited,[3] or anywhere else in IGRA.

At the beginning of Part V of the opinion, the Court of Appeals notes that the procedures in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit. *Seminole*, at 1029. This logically follows the Court's holding that the Eleventh Amendment serves as a jurisdictional bar to suit against an unconsenting state. *Ibid.* However, following the adoption of a severability analysis, the Court of Appeals reasoned that the final clause of section 2710(d)(7)(B), clause (vii), provided below, is somehow unaffected by the jurisdictional bar. By its plain language,

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[3] All cited sections refer to Title 25 of the United States Code.

however, that clause like the clauses preceding it, is inextricably tied to the jurisdiction of the federal court. As is evident, it is tied to the very clauses preceding it, from which it derives its meaning. Clause (vii) provides:

> "If a State does not consent during *the 60-day period described in clause (vi)* to a *proposed compact submitted by a mediator under clause (v)*, the *mediator shall notify* the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –
>
> "(I) which are *consistent with the proposed compact selected by the mediator under clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribes has jurisdiction."

Italics added.

Clearly, IGRA, at § 2710(d)(7)(B)(vii), contemplates the continuation of the process initiated with the lawsuit in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi). It is the *court-appointed mediator*, not the tribe, who notifies the Secretary of Interior, and only upon the refusal of a state to consent to the compact proposed by the mediator in clause (v).

The Secretary, in turn, is empowered solely to respond to a mediator's notification and may prescribe only those class III gaming procedures *consistent with a proposed compact selected by a mediator*. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Congress did not provide that tribes would be authorized to notify the Secretary directly with a request for class III gaming. Nor did it provide the Secretary with powers to prescribe gaming

procedures independent of a court-appointed mediator's selected compact. Congress envisioned these procedures as a *limitation* upon the Secretary of Interior, following multiple opportunities to resolve outstanding differences between a state and tribe once litigation has arisen. To provide a remedy independent of the statutory process would be like proceeding to sentencing once a criminal defendant asserts the protection of the Fifth Amendment. Congress attempted to provide a process which protected the significant interests of the parties. Indeed, Congress noted the entire § 2710(d)(7) was

> " . . . the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of the States in regulating such gaming."

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess., 14.

The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good-faith negotiation was designed as the least offensive option "to encourage States to deal fairly with tribes as sovereign governments," *ibid.*, but also noted that the state had legitimate governmental interests to protect, including an interest in regulating class III gaming. Congress made no provision for the Secretary to substitute his discretion for that of the state, particularly in deciding important and difficult issues of state gambling law. It instead limited the Secretary to actions consistent with the exercise of a mediator's discretion. Congress could have provided an alternate means for the tribe to request class III gaming from the Secretary and for the Secretary to respond to that request, but Congress did *not* provide any such mechanism. The Court of Appeals is not free to

fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994); see *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77, 97 (1981).

Amici states now face the prospect that the Court of Appeals' statement, will be offered by Indian tribes to the Secretary of Interior as a by-pass mechanism to serious negotiations and a new judicially-created protocol for the Secretary to entertain requests for class III gaming. The difficulty arises whenever a state refuses to concede to tribal demands for casino-type class III gaming which violates state law, but which a tribe maintains is "part of the public policy of the state" under *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1988). In California and Texas, federal district courts have opined that certain casino-type games are properly the subject of negotiations, notwithstanding the criminal prohibitions on this activity. See, e.g., *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503 (S.D. Cal. 1992). Where the state believes that it need not negotiate for such activity, it faces the prospect of a lawsuit by the tribe for failure to negotiate in good faith, with the possibility of an unwanted mediation and secretarial procedures consistent with an appointed mediator's decision. Under such conditions, the unequal burden is on the state, which must then concede to the tribal demands or face the possibility that an appointed mediator's discretion will be substituted for the discretion of the state. It is under these and similar circumstances that certain states have raised the Eleventh Amendment as a bar to the lawsuits. In other states there are constitutional or other internal impediments to the express waiver of state sovereign immunity.

In any case, states have no reason to expect that upon dismissal of a suit for lack of subject-matter jurisdiction the Secretary of Interior has the unfettered power to consider tribal requests for class III gaming, as this is simply not evident in the statute. Instead, the Secretary's powers rest on the jurisdiction of the federal court to order compact negotiations and appoint a mediator, who, in turn, must follow statutorily-prescribed procedures before the Secretary may act upon the appointed mediator's notification and compact selection. Congress specifically granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii), namely, to prescribe consistently with an appointed mediator's compact selection; in this subsection, the Secretary has no power to decide a matter involving *legislative* discretion, such as what class III gaming to permit or not permit. See *American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). While broad delegations of power have been upheld, see *Mistretta v. United States*, 488 U.S. 361, 373-374 (1989), by contrast here, IGRA grants a narrow *regulatory* discretion to the Secretary. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-430 (1935).

II.
ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL

The court-fashioned secretarial remedy discussed above is apparently premised on the Court of Appeals' conclusion that the lawsuit and mediation provisions in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) were severable from

IGRA. Amici states submit the severance analysis is legally incorrect. In concluding that the Eleventh Amendment serves as a jurisdictional bar in IGRA, the Court of Appeals has upheld the states' sovereign immunity as a defense to certain actions. The Court of Appeals did not, however, hold the lawsuit and mediation provisions in IGRA to be unconstitutional. In fact, in footnote 15, the Court below noted that a state may consent to suit, "*in which case these provisions remain in full force.*" If the provisions remain in full force for states consenting to suit and are barred for lack of subject-matter jurisdiction for states not consenting to suit, the provisions are not unconstitutional; the Court of Appeals did not invalidate them. As the Court of Appeals decided, the provisions are subject to a *defense* of lack of jurisdiction in certain cases. Were the provisions invalid as contrary to the Constitution, they should be dropped altogether. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Unconstitutional provisions must be severed from the statute. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 685 (1987). However, the lawsuit provisions of IGRA cannot be unconstitutional and severable on the one hand and "*remain in full force*" here and there, as acknowledged by the Court of Appeals, *Seminole*, n. 15.

By upholding the constitutional validity of the Eleventh Amendment as a jurisdictional bar, the Court of Appeals determined that the case must be dismissed for lack of subject-matter jurisdiction. Thus, it cannot properly reach the question of severability or whether other remedies might work for the tribe under IGRA. Indeed, upon affirmance of the dismissal for lack of subject matter jurisdiction, there is no further "case or controversy," within the meaning of Article III, § 2, clause 1, of the

Federal Constitution, before the Court of Appeals. The court cannot give decisions which are primarily advisory, nor can it exercise functions which are essentially legislative. *Federal Radio Com. v. General Electric Co.*, 281 U.S. 464, 469 (1930); *Flast v. Cohen*, 392 U.S. 83, 95 (1942).

As the bar of the Eleventh Amendment is jurisdictional, once the action is found to be barred, a severance analysis and further interpretation is inappropriate. See *Apache Tribe of Mescalero Reservation v. New Mexico*, CIV 92-076-JC, Slip Op. at 2 (DC N.M., Dec. 22, 1992).[4] Further, dismissal on Eleventh Amendment grounds bars the consideration of the merits of the underlying action. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605, 613 (1993); *United States v. Sisson*, 399 U.S. 267, 270 (1970). Here, the Eleventh Circuit, upon affirming the *Poarch Band* dismissal on Eleventh Amendment grounds, continued with a severance analysis and substantive commentary, including the creation of a judicial remedy not expressed by the Congress. This analysis and the creation of a remedy not found in IGRA has far-reaching and destructive consequences to significant State governmental interests.

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[4] " . . . it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation [having] already found that the Eleventh Amendment precludes this action in federal court absent waiver by the State of its immunity in a federal forum." *Apache Tribe*, Slip Op. at 2.

CONCLUSION

For the reasons stated herein, amici states respectfully urge this Court to reverse and remand the case with instructions to eliminate Part V of the opinion below.

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Supreme Court, U.S.
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No. 94-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor, State of Alabama,
Petitioners,

v.

POARCH CREEK INDIANS and
POARCH BAND OF CREEK INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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9 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. ALABAMA, WHICH SUPPORTS THE JUDGMENT OF THE ELEVENTH CIRCUIT, LACKS STANDING TO SEEK REVIEW	4
II. THE ISSUES PRESENTED BY ALABAMA ARE NOT RIPE FOR REVIEW	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

	Page
California v. Rooney, 483 U.S. 307 (1987)	4
Ex parte Young, 209 U.S. 123 (1908)	2
Franklin v. Massachusetts, 505 U.S. ——, 120 L.Ed.2d 636 (1992)	5
Johnson v. DeGrandy, —— U.S. ——, 62 U.S.L.W. 4755 (U.S. June 30, 1994)	4
Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994)	2, 5
Public Serv. Comm'n v. Brashear Freight Lines, Inc., 306 U.S. 204 (1939)	4

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3	2, 3
U.S. Const. amend. XI	3, 4

Statutes

5 U.S.C. §§ 701 *et seq.*	5
25 U.S.C. § 2701 *et seq.*	2
25 U.S.C. § 2710(d) (7) (A) (i)	2
25 U.S.C. § 2710(d) (7) (B) (i)-(vi)	2

IN THE

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STATE OF ALABAMA and
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is an action by the Poarch Band of Creek Indians ("Tribe"),[1] a federally recognized Indian tribe, against

[1] "Poarch Band of Creek Indians" is the Tribe's official name, and the sole name under which the complaint and all pleadings were filed for the Tribe. For reasons unknown to the Tribe, the Eleventh Circuit used the additional name "Poarch Creek Indians" in its case caption, and this has been carried over into the petitioner's caption here.

the State of Alabama and its Governor, under the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. § 2701 *et seq.* The suit seeks prospective injunctive relief regarding the Act's requirement of "good faith" negotiations as to tribal requests to undertake Class III gaming. 25 U.S.C. § 2710(d)(7)(A)(i).

The Eleventh Circuit held that Congress lacks the authority, under the Indian Commerce Clause, to provide for such suits against unconsenting states. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1026-28 (11th Cir. 1994), *reprinted in* the Appendix to the State of Alabama's Petition for a Writ of Certiorari in No. 94-35 ("Al.App.") at A47-A61. It also held that the Tribe's suit against the Governor could not proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 1028-29, Al.App. at A61-A66.

The Eleventh Circuit's holding rendered inapplicable, absent state consent, the portions of IGRA providing federal courts with jurisdiction over good faith actions. *Id.* at 1029, Al.App. at A66 (citing 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i)-(vi)). While the Eleventh Circuit's holding stripped the judicial remedy from IGRA (as applied to unconsenting states), the Court's opinion indicates that tribes may, in the circumstances of this case, seek regulations from the Secretary of Interior to undertake Class III gaming. *Id.* at 1029, Al.App. at A68. The Secretary has not, however, issued any such regulations.

We incorporate by reference the more detailed Statement of the Case contained in the cross-petition of the Poarch Band of Creek Indians, filed simultaneously with this Opposition.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit dismissed the action against the State, holding that Congress lacks the power, under the Indian Commerce Clause, to abrogate state Eleventh Amendment immunity to authorize suits by tribes against states regarding "good faith" negotiations under IGRA. *Id.* at 1026-28, Al.App. at A47-A61. The Eleventh Circuit also dismissed the Tribe's action against the Governor, holding that the action to require compliance with IGRA's mandate of good faith negotiations regarding Class III gaming could not proceed under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *Id.* at 1028-29, Al.App. at A61-A66. The State of Alabama and its Governor ("Alabama") do not address these issues in their petition. These issues are presented in the Tribe's cross-petition.[2]

Alabama secured the relief it sought in the Eleventh Circuit—affirmance of dismissal of the action on Eleventh Amendment grounds. Its petition seeks review not of the judgment of the Eleventh Circuit, but rather of language in the opinion regarding the Secretary of Interior's authority to issue gaming regulations--language that Alabama characterizes as "arguably dicta." Pet. at 11 n.4.

Alabama's petition presents no question warranting independent review by this Court. The Court should decline Alabama's invitation that this Court review language that Alabama asserts is "arguably dicta," unless the Court reviews the holding of the case by granting the Tribe's cross-petition.

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[2] Essentially the same issues as those in the Tribe's cross-petition are presented by the petition in *Seminole Tribe of Florida v. Florida*, No. 94-12, which arises from the same judgment and opinion of the Eleventh Circuit as does this case.

I. ALABAMA, WHICH SUPPORTS THE JUDGMENT OF THE ELEVENTH CIRCUIT, LACKS STANDING TO SEEK REVIEW

Alabama's petition addresses certain language in the opinion of the Eleventh Circuit, but seeks to leave the judgment intact. The judgment in the case—dismissal of the action on Eleventh Amendment grounds—provided precisely the relief sought by Alabama. Alabama continues to support the judgment, stating in its petition that "the court below correctly dismissed because it lacked jurisdiction . . . ." Pet. at 21.[3]

Having secured a favorable judgment, Alabama seeks review only of that portion of the Eleventh Circuit's opinion concerning the Secretary of Interior's authority to issue regulations for Class III gaming. But, "the successful party below has no standing" to seek review in this Court. *Public Serv. Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). Moreover, this Court recently reaffirmed that it " 'reviews judgments, not statements in opinions.' " *Johnson v. DeGrandy*, 62 U.S.L.W. 4755, 4757 n.5 (U.S. June 30, 1994) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987)). This Court has made clear that a party securing a judgment in its favor will not be granted review based on what that party deems to be unfavorable language in a court opinion.

> Here, the judgment of the Court of Appeal was entirely in the State's favor . . . . The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review.

California v. Rooney, 483 U.S. 307, 311 (1987). Alabama—which secured a judgment in its favor, but does

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[3] *See also* Brief of Amicus Curiae States of California *et al.* in Support of the Petition for Certiorari at 3 ("[t]he states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA . . . .").

not support certain analysis in the Eleventh Circuit's opinion—accordingly lacks standing to seek review by this Court.

II. THE ISSUES PRESENTED BY ALABAMA ARE NOT RIPE FOR REVIEW

Even if Alabama had standing here, the questions it presents are not ripe for review. Alabama's petition seeks review of the language in the Eleventh Circuit's opinion suggesting that, if requested by the tribes in the circumstances of this case, the Secretary of Interior "may prescribe regulations governing Class III gaming on the tribe's lands." *Seminole Tribe,* 11 F.3d at 1029, A1.App. at A68.

But the Secretary of Interior has not determined whether he will issue Class III gaming regulations for the Poarch Band of Creek Indians, or any other tribe. Alabama does not contend otherwise.[4] Even if the Secretary acts, he may do so in a manner favorable to Alabama. And, if the Secretary acts, and Alabama is aggrieved because it believes the Secretary has exceeded his authority under IGRA, Alabama may then seek judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* In these circumstances, where Alabama is simply speculating that there may, at some uncertain time in the future, be agency action that may, in some unspecified manner, harm its interests, the issues presented in Alabama's petition are not ripe for review. *See Franklin v. Massachusetts,* 505 U.S. ——, 120 L.Ed.2d 636, 647-48 (1992).

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[4] Alabama states merely that it is informed that the Department of Interior has taken some unspecified "preliminary steps" in this regard. Pet. at 11 n.4. Alabama does not, and cannot, allege any decision or final action on the part of the Secretary.

CONCLUSION

For the foregoing reasons, Alabama's petition presents no issue warranting independent review by this Court. If the Court denies the cross-petition of the Poarch Band of Creek Indians, Alabama's petition should accordingly be denied as well. If the Court grants the cross-petition, the Tribe does not object to the granting of Alabama's petition.

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Supreme Court, U.S.
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No. 94-35

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor,
State of Alabama, Petitioners,

v.

POARCH CREEK INDIANS and POARCH BAND OF
CREEK INDIANS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
CASES.....	ii
STATUTES.....	ii
ARGUMENT.....	1
STANDING.....	1
RIPENESS.....	3
CONCLUSION.....	7

TABLE OF AUTHORITIES

PAGE(S)

Cases

California v. Rooney,
483 U.S. 307 (1987)..... 2

Deposit Guaranty National
Bank v. Roper,
445 U.S. 326 (1980)..... 1

Electrical Fittings Corporation
v. Thomas & Betts Company,
307 U.S. 241 (1939)..... 1

Johnson v. DeGrandy,
62 U.S.L.W. 4755,
n. 5 (U.S. June 30, 1994)..... 2

Partmar Corp. v. Paramount
Theatres Corp.
347 U.S. 89 (1958)..... 1

Seminole Tribe,
11 F.3rd at 1029..... 5

Spokane v. Washington State,
1994 WL 316443
(9th Cir. 1994)..... 3,4,5

Statutes

5 U.S.C. §§ 701, et seq..... 6

25 U.S.C. § 2710(d)(7)(B)
(iv)-(vii)..... 5

28 U.S.C. § 1254..... 2

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

STANDING

The Brief in Opposition suggests that the State of Alabama and its Governor (hereafter "Alabama") have no standing as they secured a favorable judgment below. Did the State secure a favorable judgment? Did the State really prevail, or did the Tribe by losing the battle win the war in the very same contest?

For more than fifty years this Court has recognized that the "prevailing" party, in some instances, has standing to seek reformation of a decree. Electrical Fittings Corporation v. Thomas & Betts Company, 307 U.S. 241, 242 (1939); Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 335 (1980); Partmar Corp. v. Paramount Theatres Corp., 347 U.S. 89 (1953). No decision cited by the Tribe stands for the proposition that a party is

prohibited from accepting the favorable portion of a judgment, while seeking review of the unfavorable portion.

The Tribe cites Johnson v. DeGrandy, 62 U.S.L.W. 4755, 4757, n. 5 (U.S. June 30, 1994) and California v. Rooney, 483 U.S. 307, 311 (1987) for the proposition that a party securing a favorable judgment will not be granted review based on the party's belief that the opinion below contains unfavorable language. Title 28 U.S.C. § 1254 provides that **cases** in the courts of appeal **may be reviewed** by the Supreme Court by writ of certiorari granted upon a **petition of any party** to any civil case.

That portion of the opinion of the Eleventh Circuit characterized by the Poarch Band as "unfavorable language" is much more than that. Providing that the Secretary of the Interior may prescribe

regulations for Class III gaming clearly transforms a "favorable judgment" into a matter where the "favorable judgment" is actually in favor of the "losing party" -- the Poarch Band -- rather than Alabama. There is, at least in the eyes of the Ninth Circuit, nothing at all "favorable" about Part V. of the Eleventh Circuit's judgment. Spokane v. Washington State, 1994 WL 316443 *6.

There is an old adage that goes, "let's give him a fair trial and then hang him." Well, Alabama got her fair trial and then got hung.

RIPENESS

While Alabama has taken the position that the language in Part V. of the Eleventh Circuit opinion is "arguably dicta," the Tribes, the Secretary of the

Interior[1] and the Ninth Circuit Court of Appeals in Spokane v. Washington State, 1994 WL 316443 (9th Cir. 1994) certainly do not treat it as dicta.

The Ninth Circuit stated:

> The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the

---

[1]Tribes have filed applications with the Secretary pursuant to that language. See Florida's Cross-Petition for Certiorari, p. 9, fn. 2. Furthermore, Alabama has been informed by the Department of the Interior that preliminary steps toward prescribing gaming regulations have been taken pursuant to the Eleventh Circuit's opinion. See Alabama's Petition for Certiorari, p. 10, fn. 3 and p. 11, fn. 4.

> Secretary of the Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. Seminole Tribe, 11 F.3rd at 1029. In our view, however, such a result would pervert the congressional plan. This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d) (7) (B) (iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.

Spokane, 1994 WL 316443 *6. (Emphasis added.)

The Ninth Circuit clearly found that the judicially-created remedy of the Eleventh

Circuit was "contrary to the congressional aim of state participation."

Additionally, while the question of what action, if any, the Secretary may take under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq., may not be ripe for review, that is not the question presented in Alabama's Petition. The question before this Court concerns the judicially-created remedy itself, not how that remedy is implemented.

CONCLUSION

By explicitly rejecting the Eleventh Circuit's Secretarial remedy, the Ninth Circuit has established an additional basis for granting Alabama's Petition. There now exists a direct conflict between Part V. of the judgment of the Eleventh Circuit and the judgment of the Ninth Circuit set forth above calling for the granting of certiorari by this Court.

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Nos. 94-12, 94-35, 94-189 and 94-219

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(7), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether Congress has authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, to abrogate a State's immunity from suit.

2. Whether the doctrine of *Ex parte Young* permits a suit against a state governor arising from a State's failure to negotiate an Indian gaming compact in good faith.

3. Whether, if a suit to require a State and its governor to negotiate a gaming compact is precluded by sovereign immunity, the Secretary of the Interior has statutory authority under IGRA to prescribe regulations governing Indian gaming.

TABLE OF CONTENTS

	Page
Statement	2
Discussion	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Blatchford v. *Native Village of Noatak*, 501 U.S. 775 (1991)	9
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)	2
Cheyenne River Sioux Tribe v. *South Dakota*, 3 F.3d 273 (8th Cir. 1993)	10
Cotton Petroleum Corp. v. *New Mexico*, 490 U.S. 163 (1989)	7, 12, 13
County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226 (1985)	13, 15
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	10, 11, 14
Home Tel. & Tel. Co. v. *City of Los Angeles*, 227 U.S. 278 (1913)	16
Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984)	15, 16
Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989)	6, 10, 11
Ponca Tribe of Oklahoma v. *Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030	10
Spokane Tribe of Indians v. *Washington*, 28 F.3d 991 (9th Cir. 1994), petition for cert. pending, No. 94-357	10
United States v. *Kagama*, 118 U.S. 375 (1886)	11
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989)	16
Williams v. *Lee*, 358 U.S. 217 (1959)	11
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)	12, 13
Young, Ex parte, 209 U.S. 123 (1908)	7, 9

Constitution, statutes and regulations: Page

U.S. Const.:
Art. I:
§ 8, Cl. 3:
Commerce Clause 11
Indian Commerce Clause 6, 8, 10, 12, 13, 14
Interstate Commerce Clause 6, 10, 11, 13
Art. II, § 2, Cl. 2 ..... 11, 15
Amend. XI 5, 8
Amend. XIV 14
§ 5 10
Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (25 U.S.C. 2701 *et seq.*) 2
25 U.S.C. 2701(3) 2
25 U.S.C. 2702(1) 2
25 U.S.C. 2702(2) 2
25 U.S.C. 2703(6) 2
25 U.S.C. 2703(7) 2
25 U.S.C. 2703(8) 3
25 U.S.C. 2704 3
25 U.S.C. 2710(a)(1) 2
25 U.S.C. 2710(a)(2) 3
25 U.S.C. 2710(b) 3
25 U.S.C. 2710(d)(1) 3
25 U.S.C. 2710(d)(3) 4
25 U.S.C. 2710(d)(3)(A) 3, 5, 15
25 U.S.C. 2710(d)(7) 8
25 U.S.C. 2710(d)(7)(A)(i) 3, 6, 9, 10
25 U.S.C. 2710(d)(7)(B)(i) 4
25 U.S.C. 2710(d)(7)(B)(ii) 4
25 U.S.C. 2710(d)(7)(B)(iii) 4, 15
25 U.S.C. 2710(d)(7)(B)(iv) 4, 15
25 U.S.C. 2710(d)(7)(B)(v) 4
25 U.S.C. 2710(d)(7)(B)(vi) 4
25 U.S.C. 2710(d)(7)(B)(vii) 5, 15
25 U.S.C. 2721 7
18 U.S.C. 1162 (Public Law 280) 2
25 C.F.R. 502.4 3

Miscellaneous:

	Page
Articles of Confederation Art. IX	12
The Federalist No. 42 (J. Madison) (C. Rossiter ed. 1961)	12
4 J. Amer. Cong. (Way & Gideon ed. 1823)	13

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

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SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (18 U.S.C. 1162) nor any other provision of federal law authorized California to enforce its gaming laws with respect to bingo and card games conducted by Indian Tribes, because state law regulated rather than prohibited such gaming. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. 94-12 Pet. App. 3a. At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over

class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) for class II gaming and is approved by the Chairman of the Commission; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State. 25 U.S.C. 2710(d)(1). To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

Congress provided for judicial consideration of a Tribe's allegation that a State has failed to negotiate a tribal-state compact in good faith. Under 25 U.S.C. 2710(d)(7)(A)(i), "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith." A

Tribe may initiate such a cause of action 180 days after requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(7)(B)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If the parties fail to conclude a tribal-state compact within that 60-day period, the Tribe and the State each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then is to select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents within the 60-day period to the compact selected by the mediator, the compact shall be treated as a tribal-state compact entered into by agreement pursuant to 25 U.S.C. 2710(d)(3). See 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the

relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida requested the State of Florida to commence negotiations for a compact governing gaming operations proposed by the Tribe. 94-12 Pet. App. 44a. The State was willing to negotiate concerning card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over any form of casino gambling. For that reason, negotiations broke down. *Id.* at 45a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor. 94-12 Pet. App. 26a. The Tribe alleged that the State had failed to conduct good faith negotiations as required by 25 U.S.C. 2710(d)(3)(A). The Florida defendants filed a motion to dismiss on the ground that the Eleventh Amendment barred federal court jurisdiction over the suit. 94-12 Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA, and * * * that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." 94-12 Pet. App. 30a.

3. In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to negotiate a compact to govern class III gaming. 94-189 Cross-Pet. 4. The State offered to negotiate concerning pari-mutuel wagering on horse, dog and simulcast races, but refused to negotiate concerning casino gambling. 94-35 Pet. 6-7. An impasse in the negotiations resulted. *Ibid.*

In September 1991, the Poarch Band filed suit against the State of Alabama and its Governor in the United States District Court for the Southern District of

Alabama. 94-35 Pet. App. B6. The Alabama defendants filed a motion to dismiss based on sovereign immunity. *Id.* at B8. The district court granted that motion. The court acknowledged that "IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court." *Id.* at B31. It held, however, that "Congress does not have the power to abrogate a state's Eleventh Amendment immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause." *Id.* at B36-B37. In a separate order, the district court also dismissed the Tribe's claim against the Governor on sovereign immunity grounds. *Id.* at C1-C9.

4. The court of appeals consolidated the Florida and Alabama cases for purposes of appeal. The court agreed with both district courts that "Congress intended to abrogate the states' sovereign immunity." 94-12 Pet. App. 15a. It reasoned that "unless Congress intended to abrogate the states' immunity," the grant of jurisdiction in 25 U.S.C. 2710(d)(7)(A)(i) over claims that a State has not negotiated in good faith "would be of no effect." 94-12 Pet. App. 14a-15a.

The court went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court of appeals acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 94-12 Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in

order to 'maintain[] free trade among the States, * * * the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" 94-12 Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 94-12 Pet. App. 21a. Second, the court observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against a State's governor to require good faith negotiations under IGRA. The court found the *Ex parte Young* doctrine inapplicable because it viewed negotiation of a compact under IGRA as discretionary and because it viewed a suit against the governor under IGRA as "in reality * * * against the State itself." 94-12 Pet. App. 23a-24a. The court reasoned that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state." *Ibid.*

Finally, the court discussed the question of "what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 94-12 Pet. App. 25a. Relying on the severability clause in IGRA (25 U.S.C. 2721), the

court expressed the view that if a State pleads an Eleventh Amendment defense and the case is dismissed, the Tribe "may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state." *Ibid.* At that point, the court continued, "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Ibid.*

Having held that sovereign immunity precluded suit under IGRA against a State or its governor without the State's consent, the court reversed the district court's decision in the Florida case and remanded with directions to dismiss the suit. 94-12 Pet. App. 25a. The court affirmed the order of dismissal in the Alabama case. *Ibid.*[1]

DISCUSSION

The tribal petitioners in Nos. 92-12 and 94-189 seek review of the court of appeals' holding that Congress lacks power under the Indian Commerce Clause to subject States to suit under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7). Review of that ruling is warranted because the court of appeals has, in essence, held an Act of Congress unconstitutional, and because its decision conflicts with the decisions of three other courts of appeals that have sustained the power of Congress to provide for the type of suit at issue here.

The tribal petitioners also seek review of the court of appeals' holding that an Indian Tribe may not bring a

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[1] While the appeal from the order denying the motion to dismiss the Florida case was pending in the court of appeals, the district court granted summary judgment on the merits in favor of Florida, finding that it had negotiated in good faith. The Seminole Tribe has appealed from that judgment, but its appeal has been stayed pending the outcome of the Tribe's petition here. 94-12 Pet. App. 84a.

suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the governor of a State arising from the State's failure to negotiate in good faith. Because a decision in the Tribe's favor on that issue might obviate the need for a resolution of the broader constitutional question, the Court should grant the Tribe's petition on the *Ex parte Young* question as well.

The state petitioners in Nos. 94-35 and 94-219 seek review of the court of appeals' expression of the view that, if a State does not consent to suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations to govern the conduct of gaming on the Tribe's Indian lands. That discussion in the opinion below is dicta, since the court ordered the case dismissed on sovereign immunity grounds, and the question does not in any event warrant plenary review at this time. We therefore suggest that the Court hold the States' petitions raising that issue pending its decision in Nos. 94-12 and 94-189.

1. a. Section 2710(d)(7)(A)(i) of IGRA provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Although the court of appeals correctly interpreted this jurisdictional provision as manifesting Congress's intent to abrogate a State's immunity from suit,[2] it

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[2] Compare *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786-788 (1991) (holding that 28 U.S.C. 1362 does not manifest a sufficiently clear congressional intent to abrogate state sovereign immunity in suit by Tribe).

concluded that Congress lacked authority under the Indian Commerce Clause to accomplish such an abrogation. Thus, the court essentially held 25 U.S.C. 2710(d)(7)(A)(i) unconstitutional.

That holding conflicts with the holdings of the Eighth, Ninth, and Tenth Circuits. All three of those courts have upheld the constitutionality of 25 U.S.C. 2710(d)(7)(A)(i), reasoning that Congress has the power under the Indian Commerce Clause to abrogate a State's immunity from suit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 995-997 (9th Cir. 1994), petition for cert. pending, No. 94-357 (filed Aug. 29, 1994); *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422, 1427-1432 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030 (filed Dec. 9, 1994). Review is warranted to resolve that circuit conflict regarding the constitutionality of Section 2710(d)(7)(A)(i).

b. The constitutionality of 25 U.S.C. 2710(d)(7)(A)(i) follows from this Court's decision in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which sustained the power of Congress under the Interstate Commerce Clause to provide for suits against States. In light of Congress's special powers and responsibilities with respect to Indians, "Congressional power pursuant to the Indian Commerce Clause * * * cannot be less than its authority under the Interstate Commerce Clause." *Spokane Tribe*, 28 F.3d at 997.

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that Congress has power under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of

the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In *Union Gas*, the Court held that Congress also has authority under the Interstate Commerce Clause to abrogate a State's immunity from an action for money damages. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point, rather, is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17.[3]

It follows a *fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Commerce Clause of the Constitution (Art. I, § 8, Cl. 3), the Clauses reserving the Treaty powers to the President and the Senate (Art. II, § 2, Cl. 2); and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress's power to regulate Indian commerce is rooted

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[3] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

in the same Clause as its power to regulate interstate commerce, and there is no reason for concluding that its power to provide for suits against States is any less under the Indian component of that Clause than it is under the interstate component. As this Court stated in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989), the Indian Commerce Clause confers on Congress the "plenary power to legislate in the field of Indian affairs."

Indeed, one of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, at 268-269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practice, because the proviso was relied upon by Georgia and North Carolina to treat with the Indians regarding their land and other objects and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and the States' collective commitment to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting.

The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said states, so that Congress, in either case, may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 4 J. Amer. Cong. 767 (Way & Gideon ed. 1823); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 561 ("[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States").

c. The court of appeals acknowledged that *Union Gas* is the closest precedent, but then sought to distinguish it on two grounds. 94-12 Pet. App. 18a-22a. Neither is persuasive.

First, the court observed that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause allows Congress to place limits on the States to "maintain[] free trade among the States * * *, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." 94-12 Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the issue in this case. In particular, they do not suggest that Congress lacks the power under the latter Clause that *Union Gas*

sustained under the former. To the contrary, Congress's unique power with respect to Indians, its authority and practice of protecting Tribes against state encroachments, and the historical and textual parallels between relations with Indian Tribes and relations with foreign nations, suggest that Congress has the same or greater power to abrogate state immunity from suit under the Indian Commerce Clause.

The court of appeals also sought to distinguish this Court's precedents on the ground that they involved situations in which Congress authorized suits against a State when a State was engaged in an activity "typical of private individuals" and "outside the typical realm of state authority." 94-12 Pet. App. 21a-22a. This Court's precedents do not support such a restricted view of Congress's power under the Clauses of the Constitution that permit it to authorize suits against States. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. And in *Union Gas*, the nature of the State's activity—owning a hazardous waste site—was not mentioned as a factor in the decision. The important factor in *Fitzpatrick* and *Union Gas* was that the States had ceded a portion of their traditional authority when they gave Congress the power to enforce the Fourteenth Amendment and to regulate interstate commerce. As we have explained above, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

In any event, the court of appeals erred in characterizing state negotiations with Indian Tribes as within the traditional sphere of state authority. 94-12 Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national Government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, *supra*. IGRA is consistent with that constitutional arrangement.

2. The tribal petitioners also challenge the court of appeals' holding that a suit cannot be brought under the doctrine of *Ex parte Young* against the governor of a State arising from the failure by the State to engage in good faith negotiations under IGRA. Under the doctrine of *Ex parte Young*, sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984). The tribal petitioners have sought such relief here: They have each sought prospective relief to require the governor to carry out the State's obligation under federal law to negotiate a compact in good faith.

The court of appeals concluded that *Ex parte Young* was inapplicable because negotiating a compact is discretionary. 94-12 Pet. App. 23a-24a. Under IGRA, however, once a Tribe requests the State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). If the State does not do so, it can lose the opportunity to shape the scope of gaming activity that will ultimately be permitted under federal law. See 25 U.S.C. 2710(d)(7)(B)(iv) (authorizing court-appointed mediator to choose between proposals submitted by the Tribe and the State); 25 U.S.C. 2710(d)(7)(B)(vii) (authorizing the Secretary of

the Interior to prescribe gaming consistent with the compact selected by the mediator).

The court of appeals also regarded *Ex parte Young* as inapplicable because the tribal suits are, in its view, in reality against the State. 94-12 Pet. App. 24a. But the State is the real party in interest in all official capacity suits. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst*, 465 U.S. at 107-109 & n.17. Under *Ex parte Young*, the state officer's failure to abide by federal law strips the officer of whatever protection from suit the State might have. *Pennhurst*, 465 U.S. at 104. Accordingly, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* "notwithstanding the obvious impact on the State itself." *Pennhurst*, 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes substantive and remedial obligations on the State, and not on any particular state official. 94-12 Pet. App. 24a. A State, however, can negotiate only through its officials. The obligations that IGRA places on a State can therefore readily be understood to fall on those officials who have authority under state law to negotiate on behalf of the State. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913) ("The provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."). There is no apparent dispute in these cases that the governor is the official who has authority in both Florida and Alabama to negotiate on behalf of the State.

If the Court grants review on the question of Congress's power to abrogate the States' sovereign immunity in this setting, it should also grant review of

the question whether a suit may be brought against a governor under the doctrine of *Ex parte Young* to effectuate the compact-negotiation provisions of IGRA. The two questions involve the same statutory section, and a decision on the latter might render it unnecessary to consider the broader constitutional issues raised by the former.

3. Finally, the state petitioners present questions related to a statement in the court of appeals' opinion that if a State asserts its immunity from suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations for Indian gaming on the Indian lands of that Tribe. 94-12 Pet. App. 25a. The court's discussion of that issue, however, is dictum. Although the state petitioners assert that the court of appeals has created a remedy in favor of the Tribes (94-35 Pet. 10; 94-219 Cross-Pet. 9), the only relief ordered by the court of appeals was dismissal of the suits filed by the Tribes. 94-12 Pet. App. 25a. The court has not required the Secretary to prescribe regulations; it has not precluded the States from arguing to the Secretary that he has no authority to do so; and it has not precluded the States from later bringing a judicial challenge to any assertion of such authority by the Secretary. As Florida acknowledges (94-219 Cross-Pet. 11), what the state petitioners object to is nothing more than a "discussion" of an issue. Plenary review of that issue at this time is therefore unwarranted, even if the Court were to affirm the court of appeals' judgment dismissing these suits. Moreover, no court of appeals has expressed a contrary view on that issue—or even had occasion to do so—since the three other courts of appeals that have considered suits against States under IGRA have upheld Congress's power to authorize such suits.

We do not, however, urge the Court to deny the States' petitions outright at this stage. Plenary consideration of the sovereign immunity and *Ex parte Young* issues raised by the Tribes could conceivably lead the Court to take a different view of the proper disposition of the States' petitions when the Court renders its decision on the merits, and there is no reason for the Court to foreclose its ability to do so.

CONCLUSION

The petitions for a writ of certiorari in Nos. 94-12 and 94-189 should be granted. The petitions for a writ of certiorari in Nos. 94-35 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in Nos. 94-12 and 94-189.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully files this supplemental brief to address a threshold procedural issue that was not taken into account in our initial submission and that now leads us to suggest a different disposition of the cross-petition for a writ of certiorari filed by the Poarch Band of Creek Indians in No. 94-189.

1. These cases arise under the provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, that provides for a suit to be brought in federal district court arising from a State's failure to negotiate in good faith with an Indian Tribe concerning a compact to govern Class III gaming activities on the Indian country of that Tribe. See 25 U.S.C. 2710(d)(7). The Eleventh Circuit held that Congress does not have authority under the Indian Commerce Clause of the Constitution to authorize a suit by an Indian Tribe against a State, and that a Tribe cannot bring an action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the Governor of the State arising from the State's failure to negotiate concerning a compact. 94-12 Pet. App. 12a-24a. The Eleventh Circuit therefore ordered dismissal of the suits brought by the Seminole Tribe of Florida and the Poarch Band of Creek Indians against the State and Governor of Florida and the State and Governor of Alabama, respectively. 94-12 Pet. App. 25a. The Seminole Tribe (in its petition in No. 94-12) and the Poarch Band (in its cross-petition in No. 94-189) seek review of those holdings.

The court of appeals also expressed the view that, in the event a State raises an Eleventh Amendment defense to such a suit, the Tribe may notify the Secretary of the Interior of the State's failure to negotiate a compact, and at that point the Secretary of the Interior would have authority to promulgate regulations governing Class III

gaming on the Tribe's land. 94-12 Pet. App. 25a. The State of Florida (in its cross-petition in No. 94-219) and the State of Alabama (in its petition in No. 94-35) seek review of that portion of the court of appeals' opinion.

2. In the brief filed on December 28, 1994, we suggested that the Court grant the Tribes' petitions because the Eleventh Circuit has essentially held an Act of Congress unconstitutional, because there is a circuit conflict on the constitutional question, and because the *Ex parte Young* issue that is also raised by the Tribes is related to the issue of whether the Tribes can sue the States themselves. U.S. Br. 9-17. We further suggested, however, that the Court not grant (but instead hold) the States' petitions, because the court of appeals' discussion concerning the authority of the Secretary of the Interior if a State raises an Eleventh Amendment defense is dictum, because there is no circuit conflict on that issue, and because review would be premature in the absence of any action by the Secretary to issue such regulations. U.S. Br. 17-18.

3. In suggesting that the Court hold Alabama's petition for a writ of certiorari but grant the Poarch Band's cross-petition, we did not take into account the fact that although Alabama's petition was filed within 90 days of April 6, 1994, the date on which the court of appeals denied rehearing (see 94-12 Pet. App. 86a), the Poarch Band's cross-petition was not filed until July 29, 1994, and therefore was not timely in its own right under 28 U.S.C. 2101(c) and Rules 13.1 and 13.4 of the Rules of this Court. The Poarch Band's cross-petition was filed less than 30 days after receipt of Alabama's petition, and it therefore is timely under Rule 12.3 of the Rules of this Court. However, Rule 13.5 provides that "a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of

certiorari of another party to the case is granted." Accordingly, under this Court's Rules, the Poarch Band's cross-petition cannot be granted unless the Court grants Alabama's petition.

For the reasons stated above and in our initial brief (at 16-17), we continue to believe that the issue raised in Alabama's petition does not warrant plenary review by this Court, and that Alabama's petition (along with Florida's cross-petition in No. 94-219 raising the same issue) should be held and disposed of as appropriate in light of the Court's disposition of the Eleventh Amendment and *Ex parte Young* issues. If the Court chooses to hold Alabama's petition, however, the Poarch Band's cross-petition cannot, under Rule 13.5, be granted. We therefore suggest that the Court hold the Poarch Band's cross-petition in No. 94-189 as well.

The Eleventh Amendment and *Ex parte Young* issues are presented in the Seminole Tribe's certiorari petition in No. 94-12, and the Court can reach and decide those issues in that case. There accordingly is no need to grant review in the *Poarch Band* case in order to resolve those issues. If the Court should later reverse the judgment of the court of appeals in *Seminole Tribe*, it might then choose to grant the pending petition filed by Alabama and cross-petition filed by the Poarch Band, vacate the judgment of the court of appeals in the *Poarch Band* case, and remand that case to the court of appeals for further consideration in light of this Court's ruling in the *Seminole Tribe* case. If, on the other hand, the Court should later sustain the Eleventh Amendment and *Ex parte Young* rulings of the court of appeals in the *Seminole Tribe* case, the Court could then either deny the petition in No. 94-35 and the cross-petitions in Nos. 94-189 and 94-219, or otherwise dispose of the petition and

cross-petitions as appropriate in light of its decision in *Seminole Tribe*.

CONCLUSION

The petition for a writ of certiorari in No. 94-12 should be granted. The petition for a writ of certiorari in No. 94-35 and the cross-petitions for writs of certiorari in Nos. 94-189 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in No. 94-12.

Respectfully submitted.

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